EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH-CAROLINA.

DECEMBER TERM, 1833.

JANE MCPHERSON *v.* THOMAS HUSSEY, *et al.*

A Sheriff's return and deed are *prima facie* evidence of the sale and of the identity of the land sold and that conveyed. But if the presumption exists at all in favor of deeds executed by a succeeding sheriff, under the act of 1799, *(Rev. ch.* 538) it fails when it appears that the successor knew nothing of the facts recited in his deed, but executed it from his confidence in the representations of the purchaser.

This bill was filed in 1824, and charged that a suit was instituted for alimony by his wife against the defendant *Hussey*, who then had a large real and personal estate, and that a decree was made in October, 1819, in favor of the wife, on which a sequestration and writ of *fi. fa.* issued to the sheriff of Guilford, under which he sold four tracts of lands, of which the plaintiff purchased two and took a deed from the sheriff. The bill further charged, that *Hussey*, pending that suit and for the purpose of defeating a recovery therein and any sale that might be made under process upon a decree in it, conveyed or caused to be conveyed to the other defendants all his visible estate, which was without consideration and with full knowlege on their parts of his object: In particular that one *Royl* had conveyed to *Hussey* one of the tracts claimed by the plaintiff, but that the deed had not been registered and *Royl*, at the request of *Hussey* and the defendant *Hoskins*, took up and destroyed

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that deed and made a new one to *Hoskins*: And that one *Bruce* had sold to *Hussey* the other tract of land claimed by the plaintiff, for $1200, and was to convey it when the purchase money should be paid; that *Hussey* paid $900 of it and procured *Bruce* to convey to *Hoskins*, who paid the residue of the price, but did so out of the funds of *Hussey* and has since conveyed part of the land to the defendant *Hunt* with the privity of *Hussey* and without consideration. The prayer was for the conveyance of the two tracts, (which are described in the bill,) from such of the defendants as have the legal title, by which the plaintiff was prevented from proceeding at law and for an account.

The answers denied the fraud and set up various defences and much testimony was taken to the several points; but it is unnecessary to state them or the proofs as one of the points made in the argument of the case was thought clearly to be against the plaintiff.

The answers did not admit the plaintiff's title, but denied it in general terms and put her to the proof of it.

In proof of it, the plaintiff offered in evidence the decree in the suit of *Hussey* and wife and the writ of execution issued on it in October, 1819, on which the sheriff made a return to April term, 1820, that it was "levied on 135 "acres of land in one tract, 300 in another tract, 300 "acres in a third tract and fifty acres in a fourth tract; "the title being disputed sold for $42 paid in office" signed "*A. Hanner* sheriff, by *J. Wheeler*, deputy sheriff." She further exhibited a deed, dated 17th February, 1823, made to her by *William Armfield*, then the sheriff of Guilford, for the two tracts of land claimed in the bill and in the deed described by metes and bounds and stated in the deed to contain, the one 240 and the other 33 acres.

The deposition of *Armfield* was taken by the plaintiff to other parts of her case, and to an interrogatory from the defendants on this point, he answered that the plaintiff brought the deed to him already written and that he executed it without her showing him any document or evidence upon the subject, and without any per-

sonal knowledge of his own or her rights, or of the land described in the deed.

From the record of the alimony suit, it appeared that on leave granted in October, 1825, the return on the execution was amended by *Wheeler*, by stating amongst other things, "that it was levied on a tract of land, of "300 acres more or less, or a part of a tract of land, "on Reedy Fork adjoining *Charles Bruce* and others, "and that *Jane McPherson* became the purchaser of the "tracts on Reedy Fork at $11, and paid the purchase "money to him."

Winston for the plaintiff.

Nash for the defendants.

Ruffin, Chief-Justice—after stating the pleading and proofs as above, proceeded as follows:

The objection to the plaintiff's case is, that the proof of her title is insufficient.

It is the general understanding and course to receive the return of the sheriff, and his deed, as *prima facie* evidence of the sale, and that the land conveyed is that sold. It is not intended to question the propriety of this practice. It rests upon the notion, that the deed and acts of officers import verity, because the officer is supposed to have full means of personal knowledge, and that he does know the facts affirmed by him, and that his affirmation is true, since he is under the obligation of an oath.—Whether this is to be carried to the extent, that the recitals in the deed of a succeeding Sheriff, of the acts of his predecessor, is evidence of those acts, this case does not call upon us to say; for, at all events, the presumption cannot stand against direct proof, that the new Sheriff knows not, whether what he has said be true or false.—Here the Sheriff, who made the deed, himself proves, that he had no knowledge of any one of the material facts constituting the plaintiff's right to call for a deed for the land conveyed to her; and that he made the deed upon her own word only, that she purchased at all and purchased this particular land. The truth of those facts can no longer be inferred from the deed, since the whole

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ground of inference is destroyed by the express evidence. It is then necessary that the plaintiff's purchase, and the identity of the land sold and that conveyed, should be proved by evidence independent of the Sheriff's deed. The return on the execution does not establish them. As at first made it furnishes nothing upon the subject. Admitting that five years after the return, and the expiration of the Sheriff's office, and after the new Sheriff had made a deed, the deputy who executed the process could amend the return, and that as amended it would be evidence between these parties; yet in this case it describes the land which the plaintiff is therein stated to have purchased, in terms so extremely vague, that it is impossible, by comparing that with the description in the deed, to ascertain whether the land be the same or not. It would be very unsatisfactory to decree upon such very uncertain proof. Indeed, there is nothing to which that faith can be yielded, which entitles it to the name of evidence; although the fact is one, which, from its nature, is susceptible of clear and direct proof by the testimony of the person who attempted to amend the return, and of others.

If however, the identity of the land were established, there is another radical defect in the plaintiff's case.—This suit is not to obtain a conveyance from the Sheriff. He is not a party to it. It is against other persons; to the relief against whom a valid deed from the Sheriff is essential. It is her title to the property which she seeks to recover. Such a deed she alleges in the bill she has, and exhibits it. It is not from the Sheriff who made the sale, but from his successor.

It is an indulgence to purchasers to allow them to get deeds from a Sheriff, after his office has expired, or from a succeeding Sheriff. The law originally contemplated, that the deed would be immediately made by the officer who made the sale, and while under the obligation of his oath of office. The act of 1767, (*Rev. c.* 85,) was the first departure; and from an apprehension of that danger of fraud, which is apparent in this case, that act is confined to anterior purchases, as is also that of 1784. (*Rev. c.* 223, *s.* 10.) The act of 1799, (*Rev. c.* 538,)

is the first which embraces future cases; and that is indicative of a remaining caution in the Legislature against imposition. By it the Sheriff who sold, as best knowing the truth of the case, is, although out of office, to convey, if he be living and in the State. The succeeding Sheriff personally ignorant of the facts, is authorised to do so only in cases of extreme necessity, when there is no other person in being, capable of conveying or compellable by our courts to convey—that is, where the former Sheriff is dead or has removed out of the State. The power to the successor is a special one and strictly limited. The policy on which it is formed, not less than the limitation itself, forbids the extension of the act by construction beyond its words.

Here there is no evidence, that at the time of making the deed, *Hanner* had either died or removed or has yet done so. There is not even such a recital in the deed itself, if that would do. The deed is therefore a nullity, and the bill must be dismissed with costs.

Per Curiam.—Declare that the plaintiff has not proven, that the land described in the bill and in the deed to her in the bill mentioned, dated, &c. is the same land which, it is alleged in the bill, she bought at Sheriff's sale; and declare further, if it be the same, that *Armfield*, who executed it, was not the Sheriff who made the said sale, but was a successor to *Hanner*, who did make the said sale; and declare that the said deed is void, because the plaintiff hath not charged or proved that the said *Hanner* was dead, or had left the State, and therefore dismiss the bill with costs.

MEMORANDA.

At the late Session of the Legislature, WILLIAM GASTON, Esq. of Newbern, was elected a Judge of this Court, in the place of Chief-Justice HENDERSON, whose death has been already noticed.

And at a meeting of the Judges held during this term, his Honor Judge RUFFIN, was elected Chief-Justice.

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Richard Boyd v. John D. Hawkins, *et. al.*

Agreement between trustees and *cestui que trusts* are not void but voidable, and *prima facie* require evidence of collateral facts to support them; and where a trustee had taken an assignment of a judgment which was a lien upon the trust estate, and he and the *cestui que trust* believing it could be used for his pecuniary advantage, agreed that it should be held for the benefit of the latter, and in consideration thereof, and as a compensation for his trouble, the former was allowed one fourth of the trust estate. It was held that the agreement being entered into by the *cestui que trust* under a mistake of his rights, was void.

The case of *Boyd* v *Hawkins*, (*ante p.* 195,) upon a rehearing confirmed in part, and in part disapproved, and the interlocutory order made therein altered.

After the decree pronounced in this case at last December term, (*vide ante p.* 195) the defendant filed a petition for a rehearing. The matters complained of, and which were sought to be corrected, were :

1st. That by the former decree the agreement of the 13th of September 1824 was declared to be wholly void as a measure of compensation to the defendant *Hawkins*, for services rendered the plaintiff. The defendant averred that the agreement was fair, the result of deliberation on the part of the plaintiff, and further, that the property to which it applied was situated in Virginia, where the services for which it provided a compensation were to be rendered, and that by the law and usages of that State, the agreement was valid, and constituted a proper measure of compensation.

2d. That so much of the decree whereby it was declared to be contrary to the rule of a Court of Equity to allow compensation to a trustee by way of commission, proceeded upon a mistake of the laws and usages of this State.

3d. That the allowance of the gross sum of fifteen hundred dollars as a compensation to the petitioner was inadequate, made without proper information, and should have been the subject matter of a reference to the Clerk, before whom additional testimony might have been offerred.

4th. The petitioner set forth several instances in

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which it was averred that there were mistakes and omissions, in making up the balance due by him, which it is not necessary to state.

5th. That no provision was made to protect the petitioner from a number of suits principally pending in this State, in which his agency for the plaintiff had involved him.

6th. That the decree was erroneous, in directing what proceedings should be had in the Court of Chancery in Virginia, and in prescribing to the petitioner the course which he should take in defending his rights there.

The re-hearing having been granted, the several points above set forth were, during this term extensively discussed by *Badger* for the petitioner, and *Devereux* for the plaintiff.

Ruffin, Chief Justice.—The importance of this suit to the parties, and the nature of some of the questions discussed in it, which were novel among us, make it gratifying to the Court that they have been brought up for a reconsideration by a petition to rehear the decree. It is especially so, as upon further reflection it is found that some general propositions were stated in the opinion given, that are not entirely correct; and that on other points further information, than was then laid before the Court, was necessary to doing exact justice between the parties.

Upon the principal question before discussed and adjudged, the Court sees no reason to alter the decree. That was upon the validity of the deed of the 13th September 1824, as an agreement of purchase, or as an agreement for measuring the compensation of *J. D. Hawkins*, as a trustee. No doubt, the trust was troublesome and responsible, and required Mr. *Hawkins'* personal attention. It is clear too, as stated in the decree, that the defendant had with both diligence and skill, discharged the trust. It is equally true, that it was understood by the parties, as admitted in the bill and collected from some of the deeds of trust, that Mr. *Hawkins* should receive compensation; and that his care, personal labor, time, and loss of attention to his own affairs, and the ad-

vantage derived by Mr. *Boyd* from his services, altogether may, and do constitute a meritorious consideration for a proper agreement for remuneration, and for the ultimate allowance of a liberal remuneration. But upon the principle of equity which has long formed the law of this Court for the regulation of dealings between parties standing in the relations these did, at the time of entering into the articles of September, such an agreement cannot be sustained, though not obtained by actual imposition.

Without going through the cases again, it will be sufficient to state, that although all bargains between trustee and *cestui que trust* are not absolutely void, yet they are not favored, but are the objects of distrust. Generally, they have been regarded as mere securities, if in the event they turned out to be very gainful to the trustee and prejudicial to the other party, and unless the whole subject was clearly understood by the *cestui que trust* in its circumstances and their legal consequences. Even then, the contract has not been permitted to stand, when it was not freely entered into by the party under protection, without any undue influence on the part of the trustee, or any pecuniary necessity, or mental embarrassment on the other side. To gain the countenance of the Court therefore, such agreements *must*, as it has been said, prove to be fair and reasonable—such as the *cestui que trust*, as a prudent man might or would again enter into, and the trustee might, consistently with his duty, advise him to make with another person. It is impossible to define the sources of secret influence, which one person may, in their relative situation, have over another, imperceptibly to the world, and almost to themselves, and when it is not sought nor even desired; an influence which may not only control actions, but color the opinions and determine the judgment of the dependent party. It is wrong to engage him reluctantly in a contract known to be to his prejudice, and it is hardly less so to insist upon a contract with him, thought equal at the time, and to which he made no objection, but which in fact was to his prejudice, and which,

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on that ground, and upon his discovery of it, he is reluctant to proceed in. One reason why the Court leans this way is, that regarding such dealings as definitive contracts, they would conclusively bind the *cestui que trust* at all events, and might do great injustice. But taking them to be voidable, and *prima facie* to be supported by the aid of collateral proofs, the Court always has the power of disposing of them in a way that will secure all parties, and do complete justice.

In the case before us, it cannot be doubted, that, certainly in Mr. *Boyd's*, and probably, in Mr. *Hawkins'* opinion, the latter was the owner of *Brown's* judgment, and could, without violating either a rule of law or morality, use it for his own benefit, by selling under it, and buying in the trust property—unquestionably that supposition entered materially and mistakenly into the agreement of September, it is recited in it and is fairly stated in the answer to have been one of the main motives. Here then is at once a clear mistake in the essence of the contract. If the truth had been known, Mr. *Hawkins* would never have advised the other party to come, nor would he have consented that he should have come, to such an agreement with any body else. Again, Mr. *Boyd* only did not know the true state and value of the property of which he was disposing, but seems to have had a different opinion upon that subject every succeeding day, and it is extremely probable that it was so uncertain, that Mr. *Hawkins'* own opinion frequently fluctuated; at all events, *Boyd's* spirits seem alternately to have been greatly elated and depressed; so that there is no likelihood that in any treaty then carried on, he either reflected coolly, or stipulated upon any confidence in himself. Now, although Mr. *Hawkins* may not have intended any advantage, and may not then have believed he was gaining any undue advantage, yet it is certain, that *Boyd* was not in a condition to protect himself, that he did not stand on his rights, that he would have yielded more, if more had beed asked; and that Mr. *Hawkins* absolutely refused to accept all that was offered. The case really then, is that of a bargain

made all on one side; and therefore as a contract, it cannot be enforced; because it turns out to be too much to the advantage of the one, and to the prejudice of the other. It is for these reasons, that contracts between trustee and *cestui que trust* can hardly be said to be binding until the relation is dissolved, and a confirmation is given, as in the case of a conveyance from a ward to one who has been his guardian. But, independent of the relation of trustee and *cestui que trust*, merely as such, that which actually existed between these parties was peculiar—the trust being of the whole estate of *Boyd*, for sale, to pay very large debts, which gave the trustee a control over his will, that could hardly be resisted. It is by no means declared that it was sought from sinister motives, or that it was exercised with any intent to oppress. But we cannot but see, that it might be so exercised; and that in fact an agreement was obtained, that may have been the result of it. It is the danger of such consequences that has given rise to the rule of equity, as one of legal policy in prevention of fraud; on which the Court is bound to relieve, although there be no actual fraud, but only a loss upon an improvident bargain—such a bargain ought not to be gained nor insisted on. The Court doth therefore affirm so much of the decree complained of, as declared that deed void for any of the purposes for which it was set up in the answer, and as sustained the first exception taken by the plaintiff to the report.

In the decree, the defendant was allowed the sum of $1500 as a compensation under all the deeds. It is now right to correct the decree in that respect; first, because the allowance was upon a wrong principle, being in a round sum as for an agency, and not as a commission, which the Court declared was against the rule of equity; and secondly, that it was not adequate, if the principle was right.

It is not seen how the error in the mere matter of law could prejudice the defendant, since the Court made him an allowance, as being agreed for in the deeds, and submitted to in the bill, except so far as its being a proper

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subject of compact might tend to sustain the deed of September. For the reasons already given, it could not have that effect; because, as a compensation it is not, in the event, fair and reasonable.

But, I believe the proposition as a rule of law cannot stand. Nothing can be more certain than that the opinion given by the Court was drawn from the purest and most undoubted sources of equity as established in England. There trustees are not paid in any mode. We thought it dangerous to do it, especially by the way of commission here, although it may be admissible as an allowance for time and labor; because it presents temptations in cases, where sales are not the direct and sole objects of the deed, for the trustee to make them unnecessarily, or to hurry them on, to the detriment of the debtor. In England, trustees seldom act personally, or are more than the nominal owners of the legal title. The business of the trust, as are almost all other negotiations, is conducted by solicitors and law agents, by whom the compensation is derived. For this reason probably the trustees which may be denominated public, as having their origin in the law, such as guardians, executors, and committees, are held to be honorary; and by consequence, those which are constituted by contract are put on the same footing. This is not so much upon the idea that men are not to have reward for their labor, as that these persons do not labor, but that those who are put in their place do.

In England it is clear that trustees who are *quasi* officers of the law as executors, &c. have no right to compensation, and by analogy the rule is extended to trustees by compact.

The state of our country, and the habits of our people are so different as to have induced the Legislatures of nearly all the States, including our own, to introduce provisions by statute for competent remuneration to those to whom the law commits the charge and care of the estates of infants and deceased persons. Individually, I doubt the policy of such regulations, and my doubts are founded on the observation of much practical injustice suffered by the helpless; and I cannot but believe, if ever professional persons should become so numerous as to be readily accessible to all such trustees as convenient agents, whose services can be substituted

But here by the act of 1799, (*Rev.* c. 536,) a different rule has been introduced as to executors, &c.

for their own personal attentions, that those laws will be repealed, because the business can then be better done and the risk of imposition in charges better provided against. But while the present necessity exists, the rule perhaps must be retained as the means of engaging honest and competent men, in moderate circumstances, to undertake such duties.

And as equity follows the law, the rule as to trustees by compact, is also altered.

It is natural that Courts of Equity, acting upon one of the most ancient and approved of their maxims, should follow the law, and adopt, in the case of conventional trustees, the rule applied by the statutes to public ones. This has been done in almost every State in the Union, we believe; at least as far as we have had an opportunity of examining their adjudications. It is in Massachusetts, (16 *Mass. Rep.* 227,) in Pennsylvania and New Jersey, as appears in *Manning* v *Manning*, (1 *John. C. C.* 529,) in Maryland (1 *Har. and Gill.* 18,) in Virginia, (1 *Wash.* 246. 4 *Hen. and Mum.* 415,) and in South-Carolina, (4 *Dess.* 110.) In New York, Chancellor *Kent* expressed himself strongly in favor of the English rule and refused compensation in *Green* v *Winter*, (1 *John. C. C.* 26;) but he was compelled to yield, when a subsequent act of the Legislature authorised the Courts to make an order in favor of public trustees. And, in answer to an enquiry, that eminent person has done the Court the honor to say, through one of its members, that he understands the old rule, denying compensation to trustees, to be pretty much abolished throughout the country, for that the statutes give it to guardians, executors and admistrators, and the Courts make a reasonable allowance to receivers appointed by them, besides reimbursing their expenses, and the equity of the statutes is by construction generally extended to conventional trustees, when the agreement is silent.

To so strong a current of authority, this court does not feel at liberty to oppose the resistance of its judgment singly; but must yield, (even were it with hesitation,) to the extent of a reasonable allowance. We are informed too, that it has been usual in some parts of this State, for trustees to charge for services; and that the

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profession have no decided opinion against it. The amount will, of course, be according to the circumstances, and not beyond that which would under the Statutes be made to executors; and if fixed by the parties, it will be subject to the revision of the Court and will be reduced to what is fair, or altogether denied, if the stipulation for it has been coerced by the creditor as the price of indulgence, or as a cover to illegal interest, or the conduct of the trustee has been *mala fide*, and injurious to the *cestui que trust*. Whether it shall be given *as* a commission or not, is hardly worth disputing about: that may be a convenient mode of computing in most cases; but the true object is a *just allowance* for time, labor, services and expenses, under all the circumstances that may be shewn before a master.

In the case before us, the Court supposed that the circumstances appeared as fully as they could be at any time shewn by the parties, and therefore proceeded to fix, at once, an allowance. Upon reflection, this is deemed to have been premature; as that view of the subject was not in the contemplation of the parties; or of the master, who took the accounts upon the basis that the agreement of September was binding. The decree must therefore be corrected in these respects; and it must now be referred to the master to ascertain, (without any reference to the agreement of the 18th of September, 1824,) and report what is a just allowance to the defendant as before mentioned, and taking into account the payments under the decree, if any, state the balance that may be due between the parties. In taking the account, the master will also credit the defendant with the sum of $72, received by the complainant *Boyd*, as the rent of the blacksmith's shop in Boydton, which was overlooked in the computation on which the decree was based.

The decree will also be extended by declaring the title of the defendant to the blacksmith's shop in Boydton, and to the slave *Patsy* a good one, and requiring the plaintiff to surrender the possession of, the shop and desist from any actions or suits in this State for or concerning them.

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A court of equity will not enjoin a suit at law, in the court of another State; neither will it direct a particular order to be made in a chancery suit thus pending, unless it be by putting a party to his election.

Upon that part of the decree which directed the suit pending in the Court of Chancery in Virginia, to be dismissed, there has been some difficulty, and the Court is not unanimous. The cases cited at the bar establish that the Chancellor in England does not confine himself to putting the parties to an election; but where they are within his jurisdiction, he restrains them by injunction from carrying on a suit previously commenced in Ireland or Scotland, and proceeds in the whole matter himself. This is commonly put upon the ground that the House of Lords is the common superior of all those Courts. But that cannot be the true ground; for the like jurisdiction is taken where the first suit is in a foreign country, or in a Colony, from which the appeal is to the King in Council. It seems to be assumed, that more complete justice can be done in the English Chancery. I wish it to be understood that I disavow altogether any such arrogance on the part of the Court in making the decree in this case. It primarily was not thought of, much less acted on. The sole ground with us was, that of the election of the parties. It is true that the pendency of a suit in another State is not, as a plea, a bar to one here. Yet, I conceive that no Court will suffer one of its suitors to vex another with two suits at the same time, for the same thing, be the other pending where it may, and upon the motion of either, will refuse to proceed in the one before it, unless the other be dismissed. These parties all live within this jurisdiction, and each admitting in the pleadings that the suit was pending in Virginia, went fully into the case here, the defendant insisting in his answer on a trial here on the merits. This struck me as an election, and that as it was improper that the other suit should go on with this, or after it was decided, the Court ought, after a decision, to make it compulsory on the parties to dispose of it. This too, was considered the most respectful course to the Courts of Virginia, as it might prevent a conflict of decision, and the consequences of process of contempt to enforce opposite decres; for it did not appear to us that any decree had been made in Virginia.

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These reasons still induce me to abide by the former decree.

But my brethren think otherwise, and I cheerfully yield to them, as the reasons of their judgment chiefly refer to the relation which the Courts bear to each other as tribunals of sister States, and the comity which, it is supposed, should be displayed by the one towards the other. We have been able to find no precedent for the decree in the decision of any of the States; and although, in general, a Court of Equity having a party before it may make him do what may seem right, yet they think that he ought not to be enjoined to any act in the Court of a sister State, because it must be presumed that Court will, in administering its own justice, make him do the same act, and at all events, the contrary ought not to be anticipated. The Courts of the United States, for this reason, refuse to entertain a bill to enjoin a judgment in a Court of law of a State. (*Diggs* v *Wolcott*, 4 *Cranch* 179, *McKim* v *Voorhies*, 7 *Ib.* 278.) In *Mead* v *Merritt*, (2 *Paige's Rep.* 403,) Chancellor *Walworth* decided that he would not entertain a suit to enjoin judicial proceedings previously commenced in another State; in which I fully agree with him, upon the presumption that justice will be done there, as well as it would be upon the new suit in our own Courts. But he remarks further, that although the Court has the physical power to act coercively upon the parties within its jurisdiction, yet he was not aware that any Court of Equity in the Union, had deliberately decided to exercise the power, by injunction on the parties to dismiss a suit in another State, for it might be retaliated, and between the Courts both parties be brought into contempt. My brethren think we ought not to set the precedent, nor expose these parties to the risk of incurring the censure of the Court in Virginia; for we cannot know whether that Court will allow the suit to be dismissed. If it ought to be, because the matters are decided between the parties in their own State, that Court will do it without our order, and of its own mere motion. They think too, that. although this Court might put the parties to

an election, yet it was not done, and that the parties did not, of themselves, elect by first trying here. It is possible also that other matters may be involved in that suit, which might have prevented an order to elect, had a motion been made; for then the party making it must have shewn by the proceedings, that the subjects were the same. Upon this last point, I took it from the pleadings that the whole matter of that suit formed a part of the one here, and I still suppose so, because the contrary is not stated by the defendant on affidavit, nor suggested in the petition. However, without that, the majority of the Court is of opinion, that the decree was erroneous; and that the parties must be left to avail themselves of the decree here as they may be able in Virginia, where it will doubtless receive full faith and credit. That part of the decree is therefore reversed and the parties left at liberty to proceed in the suit in Virginia as they may be advised and allowed by the Courts in that State.

Costs were given against the defendant, because the principal matter in controversy, which made a suit unavoidable by the complainants, was decided against the defendant. This seems to us still to be proper, although a small cash balance might be found due to the defendant. However as the case is to go again before the master, that ground for the rehearing will be reserved until the coming in of the report, and a motion for directions on it.

PER CURIAM.—DECREE CORRECTED ACCORDINGLY.

MARY CRAVEN v. PETER CRAVEN, SEN. *et al.*

A widow whose husband made a provision for her out of his personal estate, is not entitled to dower unless she dissent from the will within six months.

The acts of 1784 and 1791, (*Rev. ch.* 204 and 351,) construed by GASTON, Judge.

This was a bill filed by the plaintiff for dower in the

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land of her deceased husband, *Peter Craven*, junior; and to have a deed set up which she contended had been delivered to him by his father, the defendant *Peter*; and which had, upon his death, been suppressed, as she alleged, by the defendants. This was the principal controversy between the parties, but it is not necessary to state the allegations and proofs in respect to it, because it was admitted in the bill, that *Peter*, the husband, had made a will disposing of his personal estate only, out of which he had made a provision for the plaintiff; but its nature, or the proportion it bore to his whole estate, did not appear. The plaintiff had not dissented from this will.

Winston for the defendants, argued, that the fact of the plaintiff never having entered her dissent from the will of her husband, barred her right to dower, and that the bill must be dismissed.

Nash, contra.

GASTON, Judge.—The first question presented in this case is, whether the plaintiff has a right to dower in the land which she alleges was conveyed by the defendant *Peter*, to his son *Peter Craven*, jun. her deceased husband If this question shall be determined in her favour, it will be necessary to ascertain the disputed facts in relation to that conveyance; but if it be decided against her, then the bill must be dismissed, because her claim to relief is founded exclusively upon this right. Before the year 1784, (*Rev. ch.* 204,) the established law of this State in relation to dower was the same, with a few exceptions, not affecting the present enquiry, which our ancestors brought with them from England. The widow was entitled to be endowed of one third part of all the lands of inheritance whereof her husband was seised at any time during the coverture, and of which any issue which she might have had, could by possibility have been heir; and her claim to dower was liable to be defeated or barred either at law, or in equity, by those well known means which according to the law of England,

constituted either legal or equitable impediments to its assertion. Our act of 1784, made very important alterations in the law relative to dower. Under this act, the widow was entitled to be endowed of a third part, not of all the lands whereof her husband was seised during the coverture, but of those only whereof he died seised. The claim to be endowed was also restricted to the widow whose husband had died intestate, and to the widow who within six months after the probate of her husband's will, "the same not having made any express provision for her by the gift or devise of such part of his real or personal estate as was fully satisfactory to her," should signify her dissent thereto in open court. The act protected the widow, whom it declared thus entitled, against conveyances made by her husband with intent to defeat her of dower, and furthermore declared her entitled, if her husband left no child, or not more than two children, to one third part of his personal estate, but if he left more than two children, to an equal share with each of the children. The act also regulated the mode of proceeding to obtain dower, and endeavored to render it easy and summary. It directed that a petition should be filed in court setting forth the lands of which her husband died seised, and demanding dower; that thereupon a writ should issue to the Sheriff, to summon a jury who were to set off to her a third part of her husband's land, and put her in possession, which possession should vest in her an estate for life therein, and who should also allot to her the part of the personal estate to which she was entitled, to enure to her forever. Time soon began to manifest those inconveniencies which human sagacity seldom foresees, and never adequately guards against, and which almost necessarily follow upon any sudden change in a system long incorporated into the institutions of a country. The act of 1791, (*Rev. ch.* 351,) recites that the power given by the act of 1784 to the widow, of dissenting from her husbands will "as therein regulated, deranges the whole estate, and is likely to produce the most unhappy dissentions, and expensive law suits," and undertakes to prescribe

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new regulations by which it hopes to remedy these great mischiefs. It directs that when a widow shall have signified her dissent to her husband's will by virtue of the power given to her by the former act, and a jury shall be summoned to allot her dower, they shall first enquire whether she is as conveniently and comfortably provided for, as if dower were allotted, and if they be of that opinion, they shall so return to the Court, and by that return she shall be precluded from any claim upon her husband's lands, except those devised to her by the will. It is silent as to what shall be done in case the jury upon that enquiry should come to a different conclusion. It directs also that when a jury shall be summoned to set off to a widow thus dissenting, her part of her husband's personal estate, they shall enquire whether the legacies given her be not equal to her distributive share, and if they so return, she shall be therewith content; but if they be of opinion that the provision in the will is not equal to a distributive share, they shall allot to her so much in addition as will make it equal. The act then points out the various modes of effecting this equality accordingly as there may be a *residuum* of specific articles "not given away in particular legacies," or as the *residuum* may consist of money, or as there may be no *residuum*, or an insufficient *residuum*. Several other provisions are made in this act, and in others subsequently enacted, further regulating this subject, but as they do not affect the determination of this question, it is unnecessary now to consider them.

The husband of the plaintiff made a will by which he bequeathed to her personal estate, but devised no land; this will has been proved; and she has not dissented therefrom—assuming then for the present that her husband died siezed of land, has she a right of dower in that land? So far as we know, or have been informed, this question is now, for the first time, presented for judicial consideration, and we have to determine it without any aid to be derived from the learning and intelligence of our predecessors. One case indeed has been

been referred to in the argument, that of *Miller* and wife against *Chambers*, decided in this Court; but of which no report is to be found, in which there is no opinion filed, and of which we can learn no more than is shewn by our records. In that case the former husband of Mrs. *Miller*, had left a will in which there was no provision for her of *any kind*, and the Court sustained her claim to dower, although she had not entered of record her dissent to that will. I was of counsel in that case for the defendants, and have no doubt but that the ground on which the decree rested has been truly stated here in the argument. It was there contended on the part of the plaintiffs, that the dissent required was not a declaration of dissatisfaction with the will, as the *words* of the act seem to indicate, but dissatisfaction with the insufficient provision thereby made, and that it was idle to require a solemn dissent to be recorded, when there was nothing to dissent from; and it was further insisted that the act of 1784 was intended to confer on the widow the right, and impose upon her the obligation, to elect between the property given to her by the will, and the provision made for her by the law, and that it could not apply but in cases where an opportunity of election was presented. One or both of these positions we must presume, received the sanction of the Court.

The case of *Miller* v *Chambers*, (manuscript,) stated by GASTON, J. to establish that a widow is entitled to dower when her husband makes no provision for her, although she may not have entered her dissent from the will.

The present occasion calls upon us for no opinion, nor do we mean to express any, on the point adjudged in the case referred to. We are bound to regard every adjudication of this Court as clear evidence of the Law of the land, until the contrary is conclusively shewn. If indeed, the revision of that determination were necessary, we should not hesitate to enter upon it, but we should do so with all the respect which is due to the high talents of those who made it, and all that solicitude for stability and certainty in judicial decisions which a deep sense of duty ought to inspire. But that judgment and the positions on which it is believed to be founded, do not bear upon the question in this case. Here there was a provision by will for the plaintiff, and something therefore from which she could dissent, and which she might

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elect to take in preference to what the law would give. For ought we know, the provision was ample, and so far satisfactory, that she was unwilling to protest in open Court against it as insufficient, or against the will as treating her with injustice. The will has not been produced, and we know nothing of it but from the plaintiffs statement in her bill. She alleges that it gave her personal property, but no land, and upon this allegation she claims dower, although she has not dissented.

On behalf of the plaintiff it is insisted, that under the acts referred to, the widow is recognized as having a perfect right to a certain part of the land as well as of the personal property of her husband; that *these* are regarded as entirely distinct funds, that whatever may be the value of the legacies given her, and however far it may exceed that of a distributive share, she is nevertheless entitled to a full dower in the land; that she may save the unnecessary enquiry with respect to her share of the personal property when satisfied therewith, and dissent only in respect to the *insufficiency* of the land given her; and when personalty *alone* is bequeathed, her omission to dissent amounts to no more than an acknowledgement that she does not complain in that respect. This argument has been attentively considered, but it has not induced us to adopt the conclusion which it endeavours to establish. The widow is indeed regarded as having a right to a part of both species of property, and these are such distinct funds that she may, however *liberally* provided for out of one them, successfully assert a claim to be *legally* provided for out of the other. But who is the widow thus entitled, and how is she to advance this claim? The act of 1791 is entirely silent in these respects. It prescribes only the proceedings which are to take place after the judgment of the Court shall have been rendered in favor of the petitioner for dower, and after the jury is summoned in pursuance of that judgment, and by its *express* and unequivocal terms can apply to *no* case where a dissent has not been expressed. "When a widow *has* by virtue of the power to her given in the said act, signified her dissent from her husbands

A widow is entitled to a provision from both the real and personal estate of her husband, and however liberally he may have provided for her out of one, she may, by entering her dissent to his will obtain her legal provision out of the other.

will, and the Sheriff *in consequence thereof*, and by order of the court has summoned a jury &c." such words as these leave no room for construction. Recourse therefore must be had to the act of 1784, to answer these enquiries, and the language of this act is very explicit. It enumerates two classes of widows for whom it provides—the first comprehends the widows of those who have died intestate, in which class the plaintiff is not included—and the second the widows of those who have left last wills, and therein not made *any* express provision for their wives by giving and devising such part *or* parcel of their *real or personal estate*, as shall be fully satisfactory. She claims to be included in this class, not because her husband has not made *any* provision for her in real or personal estate—he has provided for her in personal estate—but because that provision is not *fully* satisfactory, and she wants dower in his lands. How is this claim to be asserted? The act answers, "Such widow may signify her dissent thereto before the judges of the Superior Court, or in the court of the county where she resides, in open court within six months after the probate of the will, and *then and in that case*, she shall be entitled to dower in the following manner, &c." The expression of this dissent in the manner prescribed, is thus made by the plain words of the act, an indispensable pre-requisite to the assertion of this her claim. Where the language of a statute is free from ambiguity, there is much hazard of misconstruction by departing from it in search of the supposed policy of the Legislature. If however we are to suppose that the Legislature intended to establish a more general and precise rule of election, than that which theretofore prevailed, when a demand of dower by a widow conflicted with the will of her husband, this supposition will conduct us to the same result as is indicated by the literal construction of the statute. Every devise or bequest in a will imports a bounty, and therefore *in general*, cannot be averred to be given in satisfaction for that to which the devisee or legatee is by law entitled. In consequence of this principle it was the law before our act of 1784, that a devise

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of lands to the wife could not be averred to be in satisfaction of dower unless it was so expressed, or unless, according to the opinion of Lord *Camden* in *Villareal* v *Galway*, (1 *Bro. Rep.* 292, *note*, *Ambler* 682,) the claim of dower disappointed the will, and was inconsistent with it. Still less could a bequest of personalty where no notice was taken of dower, (*Ayres* v *Willis*, 1 *Ves.* 230,) be considered as a gift in satisfaction thereof, and imposing on the widow the necessity of choosing between the gift and her legal dower. But it was clear that if the bequest was declared to be made in satisfaction of dower, or such intention could be deduced by manifest implication from the will, the widow was bound to elect, either to accept the testamentary provision, or refusing it to betake herself to her dower. It is needless to state the authorities for this position, but they may be found by recurring to Chancellor *Kent's* valuable commentaries (*Vol.* 4. *pages* 56 & 57.) The Legislature substituted a new rule, more absolute and universal. They made every case of a testamentary disposition by a husband in favor of his wife, a case of election—whether the provision in real or personal estate was made to her, or to some other person for her use, whether the intent that she should take it in lieu of dower was expressed or not expressed; and whether it could be implied, or could not be implied from the structure and language of the will. And to remove all dispute as to the fact of her election, they declared her to have elected to take under the will, unless her refusal so to take was manifested within a prescribed time, by a solemn dissent in open court.

It is to be recollected that the act of 1784, contemplated an acceptance of the testamentary provision as "fully satisfactory," or an entire renunciation of it. All its enactments must be construed with reference to the *then* purposes of the Legislature. The widow could not under that act hold the personal property given to her, and get dower by law. Unless she dissented, the will regulated the extent of her claims upon the estate of her husband; and if she dissented, the law prescribed what

should be their extent, viz: one third part for life of his lands, and a third or a smaller part, according to the number of children, of his personal property absolutely. The dissent entitled her to this, but to no more. The power of the widow to procure indirectly, and in consequence of dissent a greater part of the estate than she could have claimed in case of intestacy, grew out of the new regulations made by the act of 1791. Perhaps the Legislature of 1791 did not foresee this result, or if they did they might have regarded it as a less evil than those which occupied their minds, and which they were anxious to cure. Be this as it may these new regulations are, as we have seen necessarily confined to the cases where a dissent has been entered, and it cannot be inferred that such a power does exist where there is no dissent, because it may be exercised when there is a dissent. It is very true that the regulations in the act of 1791 do offer strong temptations to widows to dissent in many cases where a sense of propriety ought to forbid them from doing so. It insures to them all that is given, however greatly it may exceed in one species of property their reasonable share, and presents them a chance of getting more in the other, even to the injury of the children of their husband. But there is a check, whether sufficiently strong or not, it is not for us to say, upon the wanton abuse of this power. The dissent must be expressed within six months after probate of the will, while the memory of the deceased is fresh in their minds, and must be declared not in a chamber, were the influence of public sentiment may be disregarded, but in open court of their county. An interpretation upon these statutes not called for by their words, nor required by their objects, will not be recommended to our judgment because it has a tendency to remove this check upon the abuse of a power to which there is, (unavoidably perhaps,) a too strong temptation.

If we yet entertained doubts upon this question, there are interests of great magnitude and of general concern, the security of which demands the decision which we shall make. The widows right to dower is paramount

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to the claims of her husband's creditors. It attaches to the lands after they have been aliened by the heirs. There is no statute of limitations prescribing the period within which it must be asserted. Justice, which it is the first object of every well regulated society to establish, and the repose of the community, an object second only in importance to justice, require that it should be ascertained, as speedily as convenience will permit, whether the lands of a deceased man in the hands of his heirs and devisees are, or are not subject to this incumbrance. The law has defined the time, and prescribed the mode when and how, this fact can be certainly known. The most obvious considerations of public policy forbid, without the clearest warrant, judicial exposition which will have a tendency to defeat this great purpose of the law.

It is the opinion of the Court that the plaintiff has not a right to be endowed of the land in respect to which she has instituted this action, and that her bill must therefore be dismissed. But the Court will not give the defendant costs. The question on which the cause is decided, was a new one and well worthy of being tried, and the conduct of the defendants in spoliating the deed has been highly reprehensible. The parties must pay their costs respectively.

PER CURIAM.—Declare that *Peter Craven* junior, duly made his will, and thereby bequeathed to the plaintiff a part of his personal estate, that the said will was duly proved, and that it doth not appear that the plaintiff dissented therefrom within &c. and that therefore the plaintiff hath not in law a right to demand dower of the lands of the said *Peter* her husband, and dismiss the bill without costs.

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Isaac Fraser *v.* Joseph M. Alexander, *et. al.*

Upon the construction of a will reciting an intention to dispose "of what worldly estate" &c. and directing "that all my property, consisting of lands, stock of every kind, household and kitchen furniture, wagons, farming tools" should be sold at public sale, and disposing of the sales; and in another clause directing the sale of slaves, but making no disposition of the proceeds.—It was held that the words *"all my property,"* were qualified by the words *"consisting of"* and restrained to the enumerated subjects, and that the sales of the slaves went to the next of kin.

The bill stated that the plaintiff having been requested by *Sarah Carson* to draft her will complied and drew it as follows :

"In the name of God, Amen, &c. and as to what worldly estate it has pleased God to bless me with, I dispose of in the following manner : *Item*, first : It is my will that all my property, consisting of lands, stock of every kind, household and kitchen furniture, wagon and farming tools, be sold at public sale, and the money thence arising to be disposed of as follows, viz : all my just debts to be paid and funeral expenses, then to each of my heirs at law, viz : my mother *Ann*, and sister *Nancy*, I give and bequeath the sum of fifty dollars each, provided they should call for it in the space of three years from this date, and all the balance it is my will that it go to the use of the Presbyterian churches in the following manner : After paying the expenses of settling my estate, the one-third to Hopewell Church, one-third to Sugar creek Church, and the other third to the use of Pan creek Church. It is my will that my Executor sell my negroes at private sale, giving to each one of them a choice of masters, that can make a choice. It is my will that *Isaac Fraser* execute this my last will and testament, and I do hereby revoke any and all former wills by me heretofore made, witness, &c."

The plaintiff averred that the negroes were expressly included in the first clause, giving the property to the three churches, and were stricken out of it solely to enable the executors to sell them at private sale, and thus

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permit them to select their masters. That the plaintiff and the testatrix both thought there was a clear disposition of the proceeds of the sale of the slaves, similar in all respects, to that of the other parts of the estate. The trustees of the three churches, and the next of kin were made defendants, and the prayer was to have the mistake corrected, or to have a declaration made of the title of the Churches to the proceeds of the sale of the slaves.

The next of kin denied any mistake in the draft of the will to be within their knowledge, and insisted upon their right to the sales of the slaves.

The cause was heard upon bill and answer before Seawell Judge, at Mecklenburg on the last Spring Term, who ruled,

1st. "That the bill and answer fell short of ascertaining satisfactorily the truth of the alleged mistake."

2d. Upon the construction of the will that "although it professed to dispose of what worldly estate the testatrix possessed, which words were equivalent to *all* her estate, yet that the proceeds of the sale of her negroes was not disposed of; that it might be said of the testatrix, *voluit sed non dixit*. That the legatees, if they take at all, must do so by an express bequest or by a necessary implication of one, neither of which appeared. That the next of kin are those on whom the law casts the estate in default of a different disposition." His Honor then proceeded to ascertain the several sums due the legatees, and the next of kin, and decreed accordingly, from which the trustees of the churches appealed.

No Counsel appeared for the legatees in this Court.

Devereux for the next of kin.

Ruffin, Chief Justice.—The cause being set down for hearing upon the bill and answers, and the mistake in drawing the will, not being admitted in the answer of the next of kin, who alone could effectually admit it, the allegations of the bill upon that subject must be declared not to be established, and the case must be decided upon the construction of the will as written. The Court however, would not be understood as intimating

Can a mistake in drafting a will, appearing either upon proofs, or the answer of the next of kin be corrected? Qu.

an opinion, that it would have been otherwise, if the mistake had appeared upon evidence, or even by the answer. It is intended, as the questions of the admissibility of proofs, and of their effect do not arise in the case, to leave them altogether unaffected by the decision.

In the court of equity it was declared that the proceeds of the slaves of the testatrix, devolve upon her next of kin, as being undisposed of by the will. From that decree the trustees of the religious societies, to which the charitable bequests are made, appealed; and the only question made here is, whether the decree in that respect is right. I fully concur in the opinion delivered by the judge. I should think with him, if the whole depended on the first clause of the will alone. It is true the testatrix set out by declaring that she intends to dispose of "what worldly estate it had pleased God to bless her with," and next says "it is my will, *that all my property*, &c. shall be sold at public sale, and the money arising therefrom disposed of as follows:" which is sufficient, unless qualified by something else, to carry every thing. But here, after those general words "all my property," follow "consisting of lands, stock of every kind, household and kitchen furniture, wagon and farming tools:" which, I think, do qualify the force of the preceding larger terms, and confine the bequest to the subjects particularly denominated. Doubtless there may be cases in which a subsequent enumeration would not be held to be restrictive of the general words. If I give "all my property and estate, my lands, my slaves, my money on hand and due on bonds," stock in funds or in banks, or money due on account might pass. The superadded particulars would be rather cumulative than restrictive, and evince that those things were known by the testator to be of the estate, and were intended to be disposed of; but it would not shew that those things alone were in his contemplation. The legacy would not be confined to the particulars enumerated, because not restricted to them in terms; but the enumeration would rather be considered as defective in itself, and things *ejusdem generis* might

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pass under the broader terms. But when the term used does not convey the idea, that the testator is endeavoring to let it be understood what kind of things he intends to give, but emphatically to express what things he is giving, the general expressions must be controlled by the particulars, and the bequest confined to the very things specified. Here, "all my property" is controlled by "consisting." It is not "all the property" absolutely; but all that "consisting of," or *which consists of* land, stock, &c. It is not a defective enumeration of the things intended to be given, but is a precise description of the specific things given, and of all of them. Suppose there had been money or bonds in this case.—Nobody would have surmised that they were intended to pass as a part of "all my property;" especially when it is recollected that besides the restriction on those words, created by "consisting of" certain particulars, amongst which are not money or debts, there is a provision in the clause, that the property thereby given is to be sold at public sale, which is altogether inapplicable to money, whether due or in hand. If then, one thing, not of the articles enumerated, would not, by reason of the restriction pass by this bequest, how can any other thing not thus specified pass? The restrictive effect of "consisting," in context with "estate," or "property," principally produced the decision in *Doe* v *Hyman*, (*ante* 1 *vol.* 382,) and in the case cited therein by Chief-Justice Taylor, of *Timewell* v *Perkins*, (2 *Atk.* 102.)

The case of *Doe* v *Hyman*, (*ante* 1 *vol. p.* 382,) approved.

But whatever doubt might rest on that clause, standing by itself, it is removed by the subsequent one, which relates to the negroes specially. From that, it is clear they were not intended to pass by the first, because they are directed to be disposed of by private sale—a manner different from that of the articles enumerated in the first. This difference being in the contemplation of the testatrix, she must be considered as purposely withholding them from the former provision for the sale of the latter. Although she afterwards makes no actual disposition of the proceeds, that does not bring those proceeds again

A direction to sell specific property "and the money thence arising to be disposed of" in the payment of debts and legacies, makes the latter a charge upon the sales.

within the operation of the clause, from which they had been designedly excluded.

Another question is made in this Court: whether the debts and funeral expenses of the testatrix, and the legacies of $50 each to her mother and sister, are to be paid out of the surplus, or out of the fund in which the churches have an interest. In our opinion the latter is the proper construction. The general rule is, that the residue even when bequeathed is the primary fund for such purposes, although there be a charge upon another part of the estate. This however is not a question upon the effect of a charge; but rather what is given to each legatee, and out of what fund payable. The penning of this will is very particular. After turning the whole estate, except the negroes, into money, by directing a sale, come these words, "the money thence arising to be disposed of as follows, to wit, all my debts and funeral expenses paid; then to each $50, and all the balance, that it go" to the Churches. This is a precise division and appropriation of the whole fund, and determines the interest of the Churches to be what remains of it, after paying out of this very fund the preferred demands. If this fund had failed, the legacies to the mother and sister would have failed also; for they are payable out of it. "The money *thence arising*" is to pay them. It is true, that could not bind creditors; but the question is as to the intention; and that is what we are to consider in determining the legacies in charity. The balance is given; of what? Of the money arising from the sale, out of which had before been given a sum to pay debts and legacies. These are first given out of this particular fund and the balance, as the balance after answering the other purposes, is given to the Churches.

The charges of administration are to be paid out of the residue; but the debts, funeral expenses, and the two legacies of $50 each, must, according to the express words of the will, be paid out of the proceeds of the sale of the other parts of the estate, as mentioned in the first clause, and the decree reformed accordingly.

Per Curiam.—Decree affirmed.

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JOHN H. DRAKE, *et. ul.* v. HENRY BLOUNT, *et. al.*

A *cestui que trust*, has a right to relief in Equity, when the trustee either refuses or neglects to assert his right at law

As where a partnership debt was assigned to a deceased partner, and the residence of the survivor was unknown, so that a warrant of attorney to sue at law, could not be obtained; it was held that the executor of the deceased partner could recover the debt in Equity.

This bill was filed by *J. H. Drake* and *J. J. Williams* executors of *Nicholas J. Drake* deceased against *Henry Blount*, and *J. Emerson*, and set forth in substance that the defendant *Emerson*, and the deceased *N. J. Drake* had been concerned together in the practice of medicine as copartners under an agreement that *Emerson* should receive one fourth of the profits, and his copartner the other three fourths; that the defendant *Blount* became indebted to the firm, that the firm was dissolved, and that on its dissolution *Emerson* received his share of the profits, left this State and removed to some place which the plaintiffs cannot find out. The bill further alledged that *Nicholas Drake* was dead, and the plaintiffs had been duly appointed and have qualified as his executors, that among the valuable papers of their testator, they found the account of *Drake & Emerson* against *Blount*, and avered their belief that this account was just, and that in the final settlement between the copartners the same had been allotted to their testator as his exclusive property. The bill also set forth that two attempts had been made by the plaintiffs to recover the amount of this account, by a suit at law in the name of *Emerson*, the surviving partner, but that they had been nonsuited for the want of a warrant of attorney from *Emerson* to sue in his behalf. The plaintiffs further charged that they had offered to indemnify *Blount* upon paying the account, against the claims of *Emerson*, which offer had been rejected, and that finding all efforts to obtain payment by amicable means unavailing, and being unable to proceed at law in the name of *Emerson*, they prayed the aid of the Court of Equity to compel a discovery from *Blount*, and to decree the payment of what shall be found due, and for general relief.

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To this bill the defendant *Blount* put in a general demurrer.

His Honor Judge STRANGE, at Nash, on the Spring circuit of 1838, overruled the demurrer, and upon the prayer of the defendant allowed an appeal.

Badger for the defendant.

B. F. Moore for the plaintiff.

GASTON, Judge.—After stating the substance of the bill as above, proceeded as follows :—Upon the facts thus set forth, which for the present must be taken to be true, there can be little or no question but the plaintiffs are entitled to some relief. They own beneficially the money due from *Blount* to the firm of *Drake & Emerson*. *Emerson* the surviving partner hath alone the legal right to collect it, and is bound to pay over the money when collected, unless there be unsatisfied creditors of the firm, to the plaintiffs. As *Emerson* is a naked trustee, he has no inducement of interest to take upon himself the trouble of collection, and as his residence is unknown, the plaintiffs are unable either to compel him to collect, or obtain from him an authority to sue in his name. Without some aid from a Court of Equity the plaintiffs must lose what in justice they ought to receive, and the defendant will be permitted to keep, what in conscience he ought not to retain. But it is objected that these facts give the plaintiffs no right to general relief, but can at best furnish but a ground for the exercise of what is termed the auxillary jurisdiction of a Court of Equity, by removing out of the way the specific obstacle which prevents the prosecution of a suit of law. We think this objection not well founded. The interest of the plaintiffs is one of equitable cognizance only; they cannot assert their right but in a Court of Equity, and they make out a case entitling them to come into such a Court for the protection of their rights. If it be the duty of their trustee to collect the money, his misconduct furnishes a sufficient cause for the interference of a Court of Equity. If it is not his duty to make the collection personally, his absence from the

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State, and the inability of the plaintiffs to procure from him the necessary authority to act in his name, make out a case of accident, for the relief of which such a Court is the appropriate forum. And it is the general rule of a Court of Equity, when it has jurisdiction of the subject matter, to do full justice to all concerned in it. When a Court of Equity takes cognizance of a lost bond, it exercises that jurisdiction, not by undertaking to remove the obstacle in the way of the effectual assertion of the right of the obligee in an action at law, but by decreeing what is just between the parties, compelling the one to pay, and the other to indemnify. In fact it may well be questioned whether a Court of Equity will ever require that to be done in a Court of Law which is against its established rules of proceeding, to dispense with the profert of a bond, or the production of a warrant of attorney. If it could do so, it ought not, because this would be to deprive the party of a legal right, without providing an adequate security against a probable or possible loss, by such interference with it. Here all the parties interested are properly brought before the Court, and it has it in its power much more effectually to secure and protect the rights of all than could possibly be done by a Court of Law under any assistance which the Court of Equity might render.

The Court is of opinion that the demurrer was properly overruled, and that it be so certified to the Court below.

PER CURIAM.—DECREE AFFIRMED.

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ALFRED D. KERR
v.
JAMES COWEN AND CHARLES D. CONNER.

Between creditors, whose equities are equal, he who has the legal title prevails. But where he who has the legal title, had notice, at the time he advanced his money, of an equity in the other, he is postponed. As where a note was endorsed to A by B as a security, and A made subsequent advances to B, some before, and some after he had notice that the maker had an equitable set off to the note, it stands as a security to A, only for advances made before notice.

The facts in this case were, that on the 22d of January 1822, the plaintiff gave to the defendant *Conner*, two promissory notes for the sum of $1115 each, payable on the first of January 1825 and 1826. That in the year 1823, the defendant *Cowen*, in the State of Georgia, became the surety of *Conner*, for a debt due in [illegible] and that the latter, on the 12th of January 1824, endorsed to him the notes above mentioned to indemnify, him against his responsibility. On the 9th of August 1825, *Cowen* was compelled to pay the debt for which he had thus become *Conner's* surety, amounting to $1900 44. On the 26th of November following, he received from *Conner*, $900, and on the 4th of May 1827, he collected from the plaintiff $1167 68, the nett amount of the first note after deducting the costs of collection. On the 12th of August, 1823, the plaintiff became the surety of *Conner*, in a replevy bond in this State, and afterwards was compelled to pay a large sum of money on that account, and also, other sums, as the surety of *Conner*, amounting to more than was due on the second note. From a letter of the defendant *Cowen*, dated in June 1825, which was produced by the defendant *Conner*, it distinctly appeared, that he then had notice of these payments of the plaintiff, and of the fact that he looked to the notes which he had given *Conner*, for reimbursement. On the 12th of January 1824, *Conner* sold to *Cowen* by deed of bargain and sale, with covenants of general warranty, a tract of land in Georgia. Upon this land the taxes for the preceding year were

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JOHN SELLERS v. HARRY BRYAN, *et al.*

Mutual debts only, can be set off in equity as well as at law; and where A as administrator, had a judgment against B, who had in C's name, recovered one against A in his own right, and being insolvent had assigned it to a creditor, A cannot have the latter judgment applied in satisfaction of the former.

The pleadings in this case were very intricate, and the proofs exceedingly voluminous. They all resulted in the following facts. The plaintiff as the administrator of *Josiah & Esther Blackman*, at November term, 1826, of Johnston County Court, obtained a decree against the defendant *Bryan*, who had been guardian of his intestates, for $6097 98. *Bryan* was insolvent, and the plaintiff had not been able to realise from an execution sale of his property, more than half of the decree. The wife of the plaintiff, was the sister of *Josiah and Esther Blackman*, and was, under the statute of distribution, entitled to one fourth of the residue of their estates. Before the plaintiff had obtained his decree against *Bryan*, the latter had, in the name of one *Fellow*, obtained a judgment in the County Court of Sampson, against the plaintiff, for the sum of 900 dollars The beneficial interest in the suit being in the defendant *Bryan*, during its pendency he made an assignment of it to *Thomson*, also a defendant, to secure antecedent debts due by him to *Thomson*, and to the other defendants.

The plaintiff sought to extinguish the judgment against him, by applying its amount, to the payment, *pro tanto*, of his unsatisfied decree against *Bryan*.

Badger and *J. H. Bryan*, for the Plaintiff.

Devereux, for the defendant.

GASTON, Judge.—After stating the material facts as above, proceeded:—In support of this prayer, it is urged that as *Bryan*, at the time of the assingment, was insolvent, and as the assignment was made not in consideration of value, but as a mere security for pre-existing debts, the assignees have succeeded to no other rights

than those which belong to *Bryan*, and the judgment is yet subject to every equity which attached to the claim, while it was his property. Admitting this argument to be correct, it becomes necessary to enquire whether the plaintiff had a right to set off the decree against this claim while it remained the property of *Bryan*. The court is of opinion, that by the law of a Court of Equity, the plaintiff was not entitled to the set-off against *Bryan*. It is true that before any statute was ever enacted for setting off mutual debts, Chancellors had adopted the rule of natural justice which obtained in the civil law, under the title of "compensation," and according to which, where the same person was both the creditor and debtor of another person, the mutual obligations to the extent of their concurrence, extinguished each other. But in the civil law, "compensation" did not obtain except between debtors and creditors in their own right, and a debt in one right was not permitted to be set off against a debt in another right.—See *Whitaker* v. *Bush*. (*Ambler* 407,) citing *Digest* l 16, § 3 *L.* 23, *and* l 16 *Tit.* 2 *L.* 14. See also 1 *Pothier on obligations* 373. Nor since the adoption of the doctrine of "compensation," or set off, have I been able to find any case of acknowledged authority in which, except under very peculiar circumstances, the rule of mutuality has been departed from. The general principle has been repeatedly and expressly asserted, that in equity, as at law, there can be no set-off where either of the debts is in *auter droit*. (*Medlicott* v. *Bowes*, 1 *Ves.* 207. *Chapman* v. *Derby*, 2 *Ver.* 117. *Exparte Oxenden*, 1 *Atk.* 237. *Bishop* v. *Church*, 3 *Atk.* 691. *Harvey* v. *Wood*, 5 *Mad.* 409. *Gale* v. *Luttrell*, 1 *Foody & Jarvis* 186.—There are cases indeed in which the rule is departed from in appearance, but it is upheld in its spirit. Where a connection can be traced between the demands—where there is an agreement that one should liquidate the other, either expressly proved, or implied from mutual credits—where the set-off has been prevented by fraud, as in *Exparte Stephens*, (11 *Vesey*, 24.) explained in *Exparte Magden*, (19 *Ves.* 487,) these are sometimes

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spoken of as instances of a more extended application of the doctrine of set off in equity, than is permitted at law, but if so, such application prevails, because the jurisdiction of a court of equity is not so trammelled, with forms, as that of a court of law. These are not cases of *exception* to the principle of mutuality, but of *assertions* of the principle, so made, as to operate upon the truth of the transaction. It has been said, (and how this may be is not material to the present question,) that exceptions do exist in the peculiar jurisdiction which the English Chancellors administer under the Bankrupt Laws. Lord *Rosslyn* has so decided in *Ex parte Quinten*, (3 *Ves.* 248,) but this decision was disapproved by Lord *Eldon* in *Ex parte Twogood*, (11 *Ves.* 517,) and in *Ex parte Flint*, (1 *Swans.* 33.) The general law of a Court of Equity certainly is, that the debts or credits which are the subjects of set-off, must be mutual, and due to and from the same persons in the same capacity. (*Dale* v. *Cook*, 4 *Johns. ch.* 17, *Rep.* 11.) The debts here sought to be set off, were not due to, and between the same persons. The plaintiff owed the defendant *Bryan*, but the defendant did not owe the plaintiff. *His* debt was to the estate of *Josiah Blackman* and the estate of *Esther Blackman*, of which estates, *Sellers* is but the legal curator or administrator. On the death of the plaintiff, the interest in the decree will not pass to *his* representatives, but be confided to the keeping of another curator. It could not be pretended that the defendant might insist that his personal demand against the plaintiff, should be applied as a set-off to the decree which the plaintiff obtained in his capacity of administrator. And there must be something very peculiar in the case, which would nevertheless authorise the plaintiff to require that such a decree should be set-off against such a demand.

The only circumstance relied upon to take this case out of the operation of the rule requiring mutuality as essential to the set-off, is the insolvency of *Bryan*. I am unable to discover any satisfactory reason, why this circumstance ought to produce such a result. Insolven-

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CASTLES v. BRYAN.

In equity, a debt due husband and wife cannot be set-off against one due by the husband alone.

cy may deprive a debtor of the right to assign or dispose of his property, so as to defeat any equitable liens upon it, but insolvency does not of itself *create* a lien which did not before exist. It has also been insisted, that as the plaintiff's wife is entitled to a distributive share of the estates of *Josiah* and *Esther Blackman*, the plaintiff, to the extent of this share in the decree, should be regarded in equity, as the creditor of the defendant *Bryan*, and thus there is the necessary mutuality. This position cannot be maintained. In the first place the plaintiff's wife is not entitled to a specific part of this decree, but to a share in the nett amount of personal assets to be divided among the next of kin. This cannot be ascertained without an account between the administrator and next of kin, and that account cannot be taken in a suit to which the next of kin are not parties. Nor do I apprehend the court will restrain a creditor from the collection of his debt "until all these accounts are cleared, in order to see what rights of set-off there may be in the result." (*Ex parte, Twogood*, 11 *Ves.* 518.) In the next place, the plaintiff's wife is not a party to this suit, as she necessarily must be in every case where *her* rights are to be asserted; and finally, were she a party, there would be a fatal want of mutuality. The debt which *Bryan* owes *her* cannot be set-off against a debt which her husband owed *Bryan*. This point, if any authority were needed to establish it, was expressly adjudged in *ex parte Blagden* (19 *Ves.* 465.)

If these views be correct, it would seem necessarily to follow, that the plaintiff cannot have the relief which he prays for, unless he can set aside the assignment to *Thompson* and others, as fraudulent and void. If it be fraudulent, then the judgment which was rendered against the plaintiff is to be regarded as a judgment obtained by *Bryan*, and the plantiff's case may be brought within the operation of another principle of equity, or rather of the same principle somewhat modified in its application, which allows judgments to extinguish each other, when the money to be paid by one of the parties can be reclaimed by him from the party who is to re-

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ceive it. This principle has been asserted to a greater extent than that which is more generally termed set-off. It was allowed in the case of *Mitchell* v. *Oldfield*, (4 *Term Rep.* 123,) and in *Simpson* v. *Hart*, (14 *Johns. R.* 62,) where a judgment recovered by C against A and B was set off by a judgment recovered by A, against C, because, notwithstanding C's judgment was joint, the whole liability of it might be pressed against A only. This deviation from a rule of strict mutuality, which ordinarily forbids joint debts to be opposed to separate debts, by way of set-off, instead of inducing either courts of equity or courts of law, in the exercise of their equitable jurisdiction over their suitors, to deviate yet further, and to disregard still more the analogies furnished by the legislative rules of set-off, has lately had the effect of rendering them more observant of such analogies. It becomes unnecessary to examine, however, whether in the case supposed, this principle of natural equity can be invoked by the plaintiff. There is no pretence for treating the assignment as fraudulent, unless it be bad faith for an insolvent debtor to prefer one set of creditors to another, where the law has not attached a specific lien on the property, by the conveyance of which, the preference is given. The assignees here were *bona fide* assignees, and by the assignment of *Bryan*, took his claim, such as it then was, and do not require for their protection higher rights than those which followed on an honest transfer of the debt. When the judgment was rendered, against which the plaintiff asks this relief, it was in law the judgment of *Fellows*, and in equity, the judgment of the assignees. The money to be collected upon it, is not to be received by *Bryan*, but by his co-defendants, and *their* property cannot be taken for the satisfaction of *his* debts. No case has been produced which will warrant a creditor in demanding that a judgment obtained against him by the assignee of his debtor, shall be deducted out of his judgment against such debtor. The case of *Doe* v. *Darnton*, (3 *East* 149), is an authority in point, that the judgment of the *legal* assignees of an insolvent debtor, cannot be thus appropriated, and we see no reason

It is not fraudulent for a debtor to prefer one *bona fide* creditor to another.

which calls for a different rule as to the judgment of assignees in fact.

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Chaney et al. v. Craine.

It is the opinion of the Court, that the plaintiff's bill must be dismissed with costs.

PER CURIAM.—BILL DISMISSED.

THOMAS CLANCY, et al. v. THOMAS D. CRAINE.

A plea of the act of 1819, (*Rev. ch.* 1016) avoiding parol contracts for the sale of land, is bad, where the plaintiff does not pray a specific performance, but treats the contract as a nullity, and seeks other relief.

A demurrer is bad, which does not specify the parts of the bill to which it is intended to apply. More especially is it bad, when it is expressed to be "to the residue of the bill not pleaded to," when in fact the plea applies to the whole bill.

This was a bill filed in the Court of Equity for Orange county, by *Thomas Clancy*, *James Child* and *John W. Norwood*, the material allegations of which were that *Thomas Clancy* and *James Child*, being connected together, as co-partners in trade, under the firm and style of *Thomas Clancy & Company*, agreed with *Thomas D. Craine*, the defendant, who at that time, was the owner of certain grist and saw mills and a distillery, with land and fixtures annexed, to become his partners in the business of milling and distilling. That in order to carry the agreement into effect, it was stipulated that *Clancy* and *Child* should own each one third part of the lands, mills, &c. for which they were to pay a certain price, and then the business was to be conducted at their joint expense, and for their joint benefit. That the contract was reduced to writing, but never signed by either of the parties. That in pursuance of the agreement, large sums of money were paid to the defendant by *Clancy* and *Child*, as well for the interest which they had purchased, as for the repairs, improvements, &c. and that large profits were realized from the business, which came to the hands of the defendant alone, who had the personal management of the

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CLANCY et al. v. CALDER.

affairs of the concern. That in 1830, the firm of *Thomas Clancy & Co.* failed, and an assignment of their effects was made to the plaintiff *Norwood*, for the benefit of their creditors—and that in consequence of their failure, they became unable to fulfil their contract with the defendant. The bill then prayed that an account might be taken of the partnership dealings and transactions, and the defendant compelled to refund to the plaintiffs what they had paid out and advanced in the said business, and to pay over to them a just proportion of the profits.

To this bill, the defendant pleaded the act of 1819, (*Rev. ch.* 1016,) avoiding parol contracts for the sale of lands; and as to the residue of the bill, demurred for want of equity.

His Honor Judge DANIEL, on the Fall circuit of 1833, overruled the plea and demurrer, whereupon the defendant appealed.

Badger and *W. A. Graham*, for the plaintiffs.

Winston and *Waddell*, for the defendant.

GASTON, Judge:—The argument of this case has brought before us the merits of the bill, and has been conducted as though a general demurrer thereto had been put in by the defendant. That the parties may not be wholly disappointed as to the objects of this appeal, we shall express our opinion upon matters involved in the discussion, although a decision of them is not necessary for the judgment which we shall render. We think that the bill in its present form does not make out a case which entitles the plaintiff to relief. The agreement which it states to have been in fact made, but to which it denies legal validity, because not signed by the parties, consists indeed of many parts, but is yet essentially *one*.

It is an agreement of copartnership, in which provision is made for the constitution of its capital stock, by a stipulation that the defendant will bring into the stock his mills and mill tract, and that the plaintiffs shall pay him an agreed sum for this advance on his part. The contract involves an agreement for the sale of lands,

comes within the purview of the act of 1819, and may be avoided, unless signed as the act directs. But an avoidance does not affect that part only of the contract which is confined to the sale of the land, but affects the entire contract. Neither of the parties, on discovering this part to be inconvenient, can require to have the residue of the agreement executed. Unless one of the parties objects, because of the statute, the contract stands entire. If either objects, it is avoided in *toto*.

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A contract which involves an agreement for the sale of land, is within the purview of the act of 1819, and may be avoided, unless signed as the act directs.

And where the contract comprises something else, an avoidance of a part avoids the whole.

The plaintiffs, according to the frame of this bill, have elected to avoid the parol agreement, and have, as we have seen, no right to ask for its execution in part. But they ask for compensation, because of their advances made, and losses incurred upon the confidence that such agreement would be faithfully executed. But if, by their own act, the execution of it has been prevented—if they have voluntarily abandoned the agreement—where is their injury, and what their title to redress? In conscience, they should have proceeded to fulfil the agreement on their part as though it had been signed, so long as the defendant admitted its efficacy. The law has put it into their power to deny it efficacy at their option; but it will not make the defendant pay them for taking this advantage.

A vendee who avoids a parol contract for the sale of land, cannot call upon his vender for compensation.

Wherever a demand is preferred in any court for remuneration, because of the avoidance of a contract under the statute of frauds, the court will not be brought into activity except at the instance of him who offers to execute the agreement, or who has been willing and ready to execute it.

But in the exercise of our limited jurisdiction upon this appeal from an interlocutory order, we apprehend that we can only revise the decision below declaring the demurrer and plea bad. The demurrer is bad because it does not specify the particular parts of the bill demurred unto. (*Milfds. Pl.* 178. *Chitwynd* v. *Lindon*, 2 *Ves. Sen.* 450, *Robinson* v. *Thompson*, 2 *Ves. & Bea.* 118. *Weatherhead* v. *Blackburn*, *do.* 121.) The demurrer is to those parts of the bill which are not covered by the plea. This alone furnishes a sufficient reason for

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overruling it, but it is the more vicious in this case, because the plea extends to *all the accounts arising out of the sole and joint ownership* stated in the bill, every account asked may be considered as arising thereout, and the court cannot distinctly see what part of the bill is left uncovered by the plea, and to which the defendant demurs. The plea is entirely inapplicable, for the claim of the plaintiffs (such as it is) is actually *founded* upon the *invalidity* of the unsigned agreement.

We shall therefore cause our opinion to be certified to the court below, that it has not erred in overruling the demurrer and plea of the defendant; and that said court shall proceed further with said cause as it may be hereafter moved by the parties, and its discretion may direct.

PER CURIAM.—DECREE AFFIRMED.

WILLIAM KENT, *adm'r. of* SARAH A. KENT,
v.
WILLIAM WATSON, *ex'r. of* EPHRAIM MILLER.

A legacy to a grand-child "when she comes of age," and "if she dies before she arrives at lawful age or marries," then over, is contingent, and vests only upon her arrival at full age or marriage. But the payment is postponed until she comes of age, and interest accrues only from that time.

The defendant's testator, by his will, bequeathed as follows:—

"I give and bequeath to my two grand-daughters, "*Sally Ann* and *Barsheba Miller*, when they arrive at "age, one thousand dollars, to be paid them out of my "estate, or whenever my executors can afford to pay it "out of my estate. If either of my grand-daughters, "*Barsheba* or *Sally Ann Miller*, should die before they "arrive at lawful age or marry, I wish the survivor to "heir that one's part that should so die, and in case "both should die before arriving at lawful age or mar- "rying, I wish their legacies to return to my estate."

The case made by the bill and answer was, that the plaintiff married *Sarah*, who died before she arrived at full age, leaving *Barsheba* surviving her, and the only questions were, whether the the legacy to the plaintiff's

wife was lapsed because of her death within age—and if not, when did interest upon it begin to run.

Hogg, for the plaintiff.

No counsel appeared for the defendant.

DANIEL, Judge, after stating the will and facts as above set forth, proceeded:—If a legacy is given to a person, when that person arrives at the age of twenty-one, it is a contingent legacy; and if the legatee dies before that time, the legacy is lapsed. If the question now rested on the construction of the first clause in the will, relative to the two legacies to *Sally Ann* and *Barsheba Miller*, it would be very clear that the plaintiff could not recover, as it appears that *Sally Ann* died before she arrived at lawful age. The testator, however, may prevent the legacy from lapsing; but to do so, he must not only declare his intention to that effect, but he must likewise mention the person who is to take it. In the second clause in the will, concerning these two legacies, the testator expressly declares that if either of his grand-daughters should die before she arrived to the age of twenty-one, or married, her legacy should go to the survivor. He further declares that the legacies shall not come to her estate, or to his residuary legatees, until both his grand-daughters shall have died, under age and unmarried. The arrival to lawful age, or marriage of either of the two grand-daughters, were the contingencies upon which the legacies vested. If either of the events occurred, the legacy was no longer contingent, but then became a vested legacy. After the marriage of *Sally Ann*, and her death before twenty-one, the legacy could not, by the express declaration of the testator, go to the survivor, nor could it come to the testator's estate, but upon the event of both contingencies failing. Where was it then to go? The answer is plain. It became vested in *Sally Ann* on her marriage, and on her death, it went to the plaintiff, as her administrator. Although the legacy became vested on the marriage of *Sally Ann Miller*, yet we think it was not payable until the time she would have arrived at the age of twenty-one years,

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PER CURIAM.—DECREE FOR PLAINTIFF.

ROBERT P. JONES

v.

BENJAMIN BULLOCK & MOSES JONES.

Courts of Equity take jurisdiction in all matters of account—and where the administrator of a principal debtor agreed with the surety to confess assets to the action of the creditor, upon condition that the surety would pay the residue of the debt, deducting the assets really applicable to it, as an account of the administration is necessary to the relief of the administrator, his bill will be sustained.

The plaintiff averred in this bill, that one *Radford Gooch*, on whose estate he has taken out letters of administration, was, in his life-time, guardian to the children of one *Wheeler* and of one *Matterson*, and has given bonds for the faithful discharge of the office—that the defendant *Bullock* was the surety to those bonds given for the benefit of the *Wheelers*, and the defendant *Jones* to those for the benefit of the *Mattersons*—that process on these bonds was sued out against him and the defendants, returnable to May term, 1824, of Granville County Court—that the defendants, being fearful of a deficiency in the assets of *Gooch*, applied to him, and requested him to confess judgment to those actions, so as to bind the assets, and thereby give them a priority over other debts of equal dignity—that as he had been fixed with assets in several other actions brought before that time, and was moreover entirely ignorant of the amount of assets in his hands, he refused to accede to this request.---whereupon, the defendant *Bullock* renewed the request, and as an inducement for him to consent, promised him that they would indemnify him from loss by reason of the confession, and would pay any deficiency in the assets which might exist, after deducting them from the sums with which he, the plaintiff was already fixed. The

plaintiff then averred that in fact he had, in May, 1824, charged himself by confessions of assets nearly to the full amount in his hands, leaving only 166 dollars unadministered, and applicable to the debts due the *Wheelers* and *Mattersons*—that those debts amounted to 688 dollars—that the defendant *Bullock*, notwithstanding his agreement, had procured himself to be appointed guardian to the *Wheelers*, and had caused *sci. fas.* to issue upon the judgments confessed in their favor, with the intent to charge the plaintiff *de bonis propriis* with them. The bill prayed for an injunction against these actions, an account of the assets of *Gooch* in the plaintiff's hands, and for general relief.

The defendant *Bullock* denied all the allegations of the bill. The defendant *Jones* never answered, and as to him the bill was taken *pro confesso*. The agreement, as set forth in the bill, was directly proved by the gentlemen of the bar who conducted the suit against the plaintiff on the guardian bonds. There had been an order in the cause for examining the defendant *Jones de bene esse*—he also distinctly proved the case made in the bill. There was no proof that the defendant *Bullock* had procured the appointment of guardian to the *Wheelers*.

Devereux and *W. H. Haywood*, for the plaintiff.
Nash, for the defendant *Bullock*.

Daniel, Judge.—After stating the pleadings and proofs, proceeded as follows:—First, as to the agreement, it is proved as set forth in the bill by the deposition of the counsel; but the law of this court requires two witnesses to contradict the denial of the answer. The deposition of the defendant, *Jones*, has been taken, subject to all just exceptions. Can this deposition be legally read? The plaintiff seeks no decree against *Moses Jones*, and it appears that the said witness has no interest of his own to be affected by any decree that may be rendered against *Bullock*. The plaintiff in this case may examine as a witness any one of the defendants against whom there is no decree sought, and who is not concerned in interest. (2 *Mad. ch.* 416, 417-18.) This witness

An answer denying the bill must be disproved by two witnesses to entitle the plaintiff to a decree.

A defendant against whom no decree is prayed, & who has no disqualifying interest may be examined by the plaintiff.

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proves that *Bullock* agreed, in case the plaintiff would confess the judgments, that he would not hold him liable to pay more in discharge of the said confessed judgments, than the assets in his hands. This witness supports the first, and both establish the agreement as set forth in the bill.

The second objection made by the defendant *Bullock* is, that it is a case where relief might have been had at law. The answer to this objection is, that although the plaintiff might have had an action at law, he could not have had as complete relief there, as in this court. It is necessary that an account should be taken, to ascertain whether the plaintiff had assets to pay all the judgments confessed, or what portion of the same. In a court of law, and especially in an action where the administrator of *Gooch* must be plaintiff, it will scarcely be practicable to take such an account with correctness, and this court affords peculiar facilities, and possesses proper jurisdiction in matters of account.

Thirdly, the defendant alleges that the plaintiff has, or might have had assets to pay all the judgments, if he had used ordinary diligence in collecting the same.—The master has, by the consent of both parties, taken an account of the assets belonging to the estate of *Gooch*, that came to the hands of the plaintiff, and also an account of the judgments against the said administrator, and his other liabilities. The defendant has filed several exceptions to the report. On looking into the order of reference, it appears that the master was required to take an account of the amount of assets that came to the hands of the plaintiff, and also an account of the amount of judgments which had been rendered, against the administrator, their sums and dates. The master has charged the plaintiff only with such assets as actually came to his hands; he does not appear to have charged him with any sums of money that may have been lost by the mismanagement or negligence of the plaintiff; nor does he report that there has been no loss on that account. The master has reported several judgments rendered against the plaintiff, after May Court, 1824, the

time when the plaintiff confessed the judgments as mentioned in the bill, and has given the plaintiff credit for the same. But it appears to us that the plaintiff was not entitled to be credited for any judgments rendered against him after the date when he confessed the judgments in court. The plaintiff might have barred all claims which were brought against him after May Court, 1824, by pleading the judgments which he had confessed in court against these claims. If he, through ignorance or negligence, omitted to plead the judgments which were had against him in court, to warrants or suits that were subsequently brought against him, it shall not operate to the injury of the defendant. The report, as it stands, cannot be easily rectified, and we think it best to set it aside altogether, and order another reference to the master, who will take an account of the amount of assets that actually came to the hands of the plaintiff as the aministrator of *Gooch*, or which might have been collected by him, if he had used ordinary care and diligence. The master will also take an account, and report what judgments or liens against the estate of *Gooch*, existed prior to May Court, 1824. Such judgments and liens the plaintiff will be credited with in his administration account, and no other, for after that date, he had the power of barring all claims by pleading the judgments he had confessed in court, and if he did not do it, it was his own fault, and *Bullock* shall not be prejudiced thereby.

The report, therefore, is directed to be set aside, and the case is again referred to *Thomas B. Littlejohn* to take an account of the estate of *Gooch* that came to the plaintiff, or might have been obtained by his using ordinary diligence. The commissioner will also ascertain what judgments or legal liens existed against the plaintiff as administrator of *Gooch*, before the date when he confessed the judgments mentioned in the bill, viz: before May Court, 1824, of Granville county, and allow the plaintiff credit for such judgments and liens, and his expenses and reasonable commissions. The commissioner is also directed to report whether any payments, and

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if so, what payments have been made on the judgments confessed, and by whom made, and what is due thereon to the plaintiffs respectively in the said judgments.

PER CURIAM.—DIRECT AN ACCOUNT.

NANCY GUILFORD BRAY
v.
LUKE G. LAMB, *adm'r. of* WILLIAM GUILFORD, *et al.*

A legacy, "to be paid out of my estate," is charged by those words upon the land which passed by the will, especially where the personalty is very small, and was all given to the wife for life, and she appointed executrix.

William Guilford made his will, executed so as to pass real estate in 1829, which he began by saying, "I dispose of my worldly goods as follows," and then thus proceeded: "I lend to my wife *Elizabeth* the use of all my "lands during her life, and if at her death she should "leave an heir or heirs, lawfully begotten of her body by "me, the whole of my land to descend to said heir or "heirs in equal quantities, but for want of such heir or "heirs, all my lands, at my wife's death, to descend to "*Isaac G. Bell* and *William G. Bell*, to them and their "heirs."

"I give and bequeath unto *Nancy Guilford Bray* five "hundred dollars, to be raised and paid out of my es- "tate."

"I leave unto my wife the use of all the negroes that "will fall to her by her father's will during her natural life "(which negroes are not yet divided,) and at her death, "I wish them to go to my heirs lawfully begotten of "her body, if there are such, and for want of such heir "of mine, my will is, that they go to *Isaac G. Bell* and "*William G. Bell* in equal shares." The testator appointed his wife executrix.

William Guilford died immediately after making this will, which was proved in February, 1830, when his wife renounced the executorship, and also dissented from the provision made for her, and had since had dower assigned to her. She had no issue by the testator. Administration with the will annexed was granted to the defendant *Lamb*.

The present suit was brought by the legatee *Nancy G. Bray* against *Lamb* the administrator, *Elizabeth* the widow, and the remainder-men *Isaac G. Bray* and *William G. Bray*, who were infants, and the bill alleged that the personal estate was said by the administrator to be exhausted in the payment of debts, and prayed an account of it, and also of the real estate of which the testator died seized, and that her legacy might be raised, in case the personal estate should prove deficient, out of the lands in the hands of the widow and the other devisees.

The parties severally answered. *Elizabeth* the widow stated her dissent and the assignment of dower, and claimed to hold the same exempt from the legacy to the plaintiff. The infant defendants answered by their guardian, and insisted that the legacy was payable out of the personal estate only.

In the Superior Court, a reference was made to the master to take an account of the personal estate, and of the administration of the defendant *Lamb*. and also to enquire what lands the testator had at his death, and their value.

He reported in October, 1831, that the personalty amounted only to $363 81, of which all had been disbursed in the payment of debts, except the sum of $52 12, and that there were then unsatisfied judgments against the administrator to a larger amount. He also reported that the testator left lands in fee to the value of $5,777 20, whereof two tracts were sold in May, 1831, on a credit of six and twelve months, by the guardian of the infant defendants, to pay judgment debts against them, as devisees of the testators; but the debts were not enumerated, nor the amount stated. That the remaining lands, (of the value of $4,600,) were subject to the

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dower of the defendant, *Elizabeth*, and also to the dower of the widow of *Isaac Guilford*, a former owner, and were, with the exception of those parts, in the possession of the infant devisees or their guardian.

This report was confirmed in 1832, and the cause then removed to this court.

Kinney, for the plaintiff.

No counsel appeared for the defendants.

RUFFIN, Chief-Justice, after stating the case as above proceeded—The only question argued in this case, is, whether the legacy to the plaintiff is charged on the lands and it has been intimated from the bar, that it will probably be unnecessary for the court to proceed further than to the decision of that, as the parties will be *dis*posed to adjust the controversy as soon as their rights in this respect are declared. We understand that the reference was made by consent to speed the cause, and without prejudice; hence, as the devisees are infants, the court has allowed the point to be treated as open, and have considered it.

Dower assigned to a widow who dissents from her husband's will, is neither subject to debts nor legacies.

The dissent of the widow remits her to her right of dower, which is held above the will, and is liable neither to debts nor legacies, and the bill must consequently be dismissed as against her.

Upon the general question the court has no difficulty in declaring the legacy of $500 to be well charged on the real, in aid of the personal estate. It seems to us to be expressly charged. It is "to be raised out of my *estate*," are the words of the testator, and include every thing, and shew on an intention that this legacy should be raised at all events. The other provisions of the will strengthen this construction. It is true there is no residuary clause, nor are there any words annexed to the devise of the lands expressing in that part of the will that the devise was subject to this legacy. But the testator sets out with the declaration that he means to dispose of all his worldly goods, and the personalty turns out to be very inconsiderable, and except this legacy, every thing given is to the wife for life, whom he appoints executrix, with remainder over to the

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same persons, in each disposition, and upon the same contingency. It must be taken, I think, as the executrix, whose duty it is to pay the legacy, is to have the whole profits of the estate during life, that the testator could not intend that this legacy should be allowed by her to fail, in case the undisposed residue proved deficient, but that the executrix should make it good out of other parts of the estate. If this be true as against the wife, it is equally or more apparently so in respect to the remainder-men. This legacy is absolute, unconditional and immediate, and is the only disposition of that kind which gives the idea that when it is directed to be raised out of the estate, the legatee is to be preferred before those to whom a remote and contingent interest is limited, but so limited, that when it vests it carries the whole estate to the disappointment of this legatee, unless the estate vests *cum onere*. These circumstances make the intention clear, though there is no necessity of resorting to them, except as they evince that the obvious sense of the words in which the legacy is given, is the true sense in which the testator used them. We consider the charge need not be implied, but it is expressed, and so the court declares.

We do not go further at present, because the parties do not desire it. Indeed, before the court could proceed to order the money to be raised by a sale or mortgage, a further inquiry would be requisite as to the profits, or the proceeds of the former sales remaining in the guardian's hands, which may of themselves be adequate to the plaintiff's satisfaction. If the settling of the principle should not enable the parties to dispose of the controversy, either can bring any question forward upon a motion for further directions.

PER CURIAM.—DECREE ACCORDINGLY.

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JOHN Y. WILKINSON *et al.* v. ALLEN WILKINSON.

Where a father conveyed land to a son by a deed of bargain and sale, upon a bill by other children, seeking to have the land brought into hotch-pot, parol evidence cannot be received to prove that it was in fact given as an advancement.

The plaintiffs alleged that *John Y. Wilkinson* the elder, the father of the plaintiffs and the defendant, died intestate, seised of land which had been sold under an order of the Court of Equity, for partition—that the proceeds of this sale had been equally divided between them and the defendant, and that this division was erroneous, as the defendant had been fully advanced in the life-time of their father—that the land advanced to the defendant had been conveyed to him by a deed of bargain and sale, but it was founded upon no valuable consideration moving from the defendant to his father, but was entirely gratuitous, and was intended by the intestate as an advancement to the defendant.

The bill prayed a discovery, and that the defendant might elect between the land charged to have been advanced to him, and an equal share of the proceeds of the land sold for partition, and in case of his election to hold the former, that he might pay them what he had received of the latter. A copy of the deed was filed as an exhibit. It was a deed of bargain and sale in the usual form, was dated the 2d of August, 1819, and was proved and registered the day after. The consideration recited in it, was $1564½.

The defendant denied all the allegations of the bill most explicitly, and insisted that from July, 1813, to August, 1819, he acted as his father's overseer, and rendered him valuable service—that he also lent his father money, and that upon a settlement between them, his father fell largely in his debt, and in satisfaction of this debt, agreed to make, and he agreed to receive, the conveyance mentioned in the bill. He stated that he could not produce and exhibit the vouchers upon which this settlement was made, as they had been delivered up, it being supposed to be final.

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A replication was filed and many depositions taken. It is not necessary to state the proofs at length, as they are set forth in the opinion of the court.

The case was argued at a former term, as well as at this, by *Badger* for the plaintiffs, and by *Nash* and *Devereux* for the defendant.

GASTON, Judge.—After stating the pleadings as above, proceeded: A great number of witnesses have been examined on both sides, and their testimony laid before the court. Upon this testimony a preliminary question arose, and was argued by the counsel, whether any parol evidence could be received to contradict the consideration expressed in the deed. As the parties did not demand an immediate decision upon this question, and wished at all events a final decree in the cause, the Court heard the testimony, reserving to the defendant the benefit of this objection.

The determination of this question does not depend on the doctrine of estoppels at law. It depends on the proper construction and application of a rule of evidence, founded on good sense and public policy, and recognised in *all* courts, as well those of equity as of law. Written instruments are to be regarded as the authentic and permanent memorials, which the parties have deliberately appointed to testify to all and forever, what they have done. Parol evidence is in its nature less satisfactory. It may be tainted with falsehood, perverted by ignorance, prejudice, favor or mistake, and is liable to mislead, because of the weakness of human memory. It is not to be questioned, but that the general rule which declares parol evidence inadmissible to contradict or substantially to vary the terms of a written instrument obtains in a court of equity equally as in a court of law. (*Brown* v *Selwyn*, *For.* 240, *Irnham* v *Child*, 1 *Bro.* 92, *Portmore* v *Morris*, 2 *Bro.* 219.) The consideration upon which a deed is made, is an important part of the contract, and where it is distinctly declared parol evidence is not more admissible to contradict or substantially to vary that than any other *term* upon which

Parol evidence is not admissable either in equity or at law to vary the terms of a written contract.

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the parties have thus expressed their agreement, (*Peacock v Monk*, 1 *Ves. Sr.* 128.) Nor can we discover any reason which should exempt this case from the operation of the rule. It is true that the plaintiffs do not claim under this deed, nor directly against it, but they claim under him who made it, and in that capacity attempt to shew that the deed which bound him, and which binds them as privies, is in fact different from what it purports to be, and does not bind as a sale, but binds only as a gift. By having it interpreted according to the meaning which they seek to impress upon it by parol evidence, their rights under the grantor will be extended beyond those which belong to them, if the deed be allowed exclusively to declare its own meaning.

But in equity, matter of fraud, accident or surprise, may be proved by parol, to raise a trust *dehors* the deed, and affect the conscience of one claiming under it.

But as the rule itself is based upon the supposition that the written instrument is *the* memorial which the parties have made to be the permanent repository and testimony of truth, when any instrument set up as such, can be shewn not entitled to be thus respected, of necessity it must not be permitted to stand in the way of the ascertainment of truth, by such evidence as may be obtainable. Parol evidence is therefore admissible in cases of fraud, mistake and surprise. The rule is not subverted, but confirmed by these exceptions. The party does not undertake to vary the agreement expressed in the deed, and to shew that it ought to be understood in a different sense from that which the deed declares.—But to set up a matter of equity *dehors* the deed, by reason whereof it becomes unconscientious to insist upon the agreement as therein mistated. The plaintiffs here alledge that the defendant caused this consideration of value to be untruly inserted in the deed, either without the knowledge of the grantor, or by availing himself of the misconception of the grantor, that it was a necessary form to give the instrument validity. The parol evidence is admissible to support this charge, for if it be made out, then the instrument must be considered as if it had truly been what the contracting parties intended it to be. But it is admissible for this purpose only.

The deed is exhibited. It is dated on the 8d of Au-

gust 1819, recites a consideration actually paid of $1564 50, and on the day of its date is proved in court and thereupon registered. The defendants answer, responsive to the charges of fraud and mistake, is full, positive and precise. Strong testimony is necessary in opposition to such a deed, and so supported, to establish the allegations of the plaintiffs. No direct proof whatever is offered to sustain them. The evidence consists principally of the recollections of witnesses of casual conversations, which they had held many years ago with one or the other of the parties, and from which they understood that the land in question was given or intended to be given to the defendant. None of these conversations are represented as having been upon the *point* itself—the actual contract—and nothing is more common than the misapprehension of such general remarks, and the perversion of them to a meaning which they were not intended to express. Observations about the *giving* of a *deed*, might be understood as implying a *gift of the land*. These witnesses also state circumstances rendering it doubtful, whether the defendant could have saved from the compensation allowed him by his father for his services, (though none of them knew what was the stipulated compensation,) a sum equal to that stated as the price of the land. Even this testimony, such as it is, is met by the evidence of witnesses to declarations made by some of the plaintiffs, that their brother had bought this land, and to admissions by another of the plaintiffs, that he had paid a price, but one far short of that recited in the deed, and less than the value of the land. It is probable that this representation is true. In the arrangement between the parties the price might have been fixed at a sum exceeding the value of the land, and the services rated at a still more liberal estimate. But if value did indeed form a consideration for the conveyance, and the parties deliberately agreed to treat the transaction *as a sale*, an equality between the value of what was conveyed, and what was received as its price, is not essential to constitute it a sale. Were the plaintiffs fully at liberty to contradict the deed on these proofs

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we should not hold ourselves justified in pronouncing that the land was given, and not sold. But they are not at liberty to contradict it. They must shew that by reason of some unfair practice, or through mistake, or by surprise, the deed was made to express an intention different from that which the bargainor believed that it did declare. This they have failed to do, and their bill must be dismissed with costs.

PER CURIAM.—BILL DISMISSED.

THOMAS B. LITTLEJOHN *v.* LEWIS WILLIAMS, *Ex'r.*

An equity case cannot be *removed* to the Supreme Court, under the act of 1818, (*Rev. ch.* 962) when it is only set for argument upon a plea.—In such case, it can come up no otherwise than by appeal.

The bill was filed in Rowan against *Joseph Williams*, the testator of the defendant, who died in 1817, when the suit abated. A bill of revivor was filed in 1829 against the present defendant, who pleaded in bar of it. This plea was set down for argument, and in this stage of the cause, it was, by consent, removed to this court.

Devereux, who was for the plaintiff, suggested that the cause was improperly brought to this court.

Nash, for the defendant.

RUFFIN, Chief-Justice.—The court has not jurisdiction of a case in the situation of this. The act of 1818 provides for the removal of causes in equity to the Supreme Court in two cases—the one after a decision in the Superior Court, by appeal therefrom—the other before a decision, but not until the cause shall have been set down for hearing. These latter words and the context imply that no case is to be brought here, until it shall have reached that stage, in which it may be heard upon the bill, answer and proofs, and finally disposed of in

this court, without the necessity of sending it back to be proceeded on for any purpose in the Superior Court.—Accordingly, many cases have been returned without any decree here, which came up while standing on a demurrer or plea—for upon overruling them, the party is then put to answer, which cannot be done here. If the demurrer or plea be allowed in the Superior Court, and the bill thereupon dismissed, the complainant may then appeal within the act of 1818, because the decree is final, and if reversed here, the case is sent back for further proceedings below. And under the act of 1831, there may now, by leave of the Superior Court, be an appeal from a decree overruling the demurrer or plea, which does not arrest further progress in the cause in the court below. But unless upon appeal of the one kind or the other, no case can be brought here until it shall have been set for hearing on the merits. This case must therefore be remanded.

PER CURIAM.—REMAND THE CASE.

ILAI W. NUNN & SAMUEL H. STEWART,

v.

HUGH MULHOLLAND & WILLIAM MEBANE.

One who purchases at execution sale, land which has been entered, but not paid for, must at his peril complete the title, and if the entry is forfeited, he has no equity to claim the land of the defendant in the execution upon a subsequent entry of it by the latter.

The bill was filed in February, 1829, and charged that in 1826 the defendant *Mulholland* entered two tracts of vacant land in Orange county, the one containing 214, the other 60 acres; and that they were sold in May, 1828, under a judgment and execution against him, when the plaintiffs became the purchasers and took a sheriff's deed. That in July, 1829, *Mulholland* and the other defendant, *Mebane*, pretending that the former entries were lapsed, re-entered the same lands, and either

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have obtained grants or intend doing so, although they had full knowledge of the complainant's purchase, and *Mulholland* had himself pointed out those lands to the sheriff as his, and as being subject to the execution.—The bill then charged that the first entries had not lapsed, or if so, that *Mulholland* had suffered them to lapse purposely to defeat his creditors, and the plaintiffs, prayed a discovery whether grants had issued, and if so, that the defendants might be decreed to convey to the complainants, or if no grant had issued that the defendants might be decreed to obtain them and then to convey.

Mulholland, by his answer, admited the sale to the plaintiffs, and that he made the entry of 214 acres, and also in conjunction with one *Parish* entered 120 acres, his half of which he supposed to be the other tract mentioned it the bill. He denied that the entries were made in 1826, but said the time was the 11th day of December, 1825; he also denied that he requested the sheriff to levy on those lands, but admits that the sheriff shewed him his tax list, and requested him to inform him which tracts were unincumbered by a deed of trust which *Mulholland* had made to other creditors, and upon that occasion he pointed out these two. He alleged that the entries lapsed in December, 1827, or January, 1828, while he was absent from the State—that he was not present at the sale, but having understood that the plaintiffs had purchased, he soon afterwards informed them that the entries had lapsed before the sale. He admitted that afterwards, in July, 1828, he renewed the entry of 120 acres in the name of *Parish* and himself, and at the request of the other defendant *Mebane*, entered the 214 acres in his name, and for his exclusive benefit.

Mebane by his answer admitted the entry in his name in July 1828, and denied any interest of *Mulholland* in it, and insisted upon his right to enter the land as then vacant.

Both defendants denied that grants had issued, but admitted their intention to obtain them.

Winston for the plaintiffs

Nash for the defendants.

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RUFFIN, Chief-Justice, after stating the case as above, proceeded :—If the entries upon which the purchase money to the State is not alleged to have been paid, be the subject of execution, the purchaser must yet go on to complete the title and do such acts as the laws require to prevent the land becoming vacant and again the subject of entry. There is no obligation upon the defendant in execution to pay further sums of money, or perfect the title. All his rights were transferred by the sale, and the purchaser takes the land as on entry, subject to the legislative provisions affecting such interests. It is his own fault if he forfeits it to the State, and a new enterer acquires all the rights of the State. The purchase money not having been paid, there is no equity against the State or another enterer. I should therefore see no equity in the bill against either of the defendants, if the entries had not lapsed before the sale, but were suffered to do so before the filing of the bill; since the plaintiffs did not lose the right in the entry, the thing bought by them, by reason of a defect of title in *Mulholland* or by any act of his, but by their own *laches*, and when once gone from them, and vested again in the State, she could sell as well to *Mulholland* as to any other citizen, and her rights protect him.—But the present case is still stronger against the plaintiffs for the entries had lapsed at the time of the sale. The answers state them to have been made on the 11th December 1825, and there is no evidence upon the subject, except the deposition of the entry taker taken by the plaintiffs which sustains the answers. By the act of 1808, (*Rev.ch.* 759,) they lapsed on the 15th December of the second year thereafter, viz : 1827, unless the purchase money was then paid, and all the subsequent acts allowing further time to perfect titles, extend only to entries "upon which the purchase money has been paid in due time." The plaintiffs then bought nothing and can have no relief. Whether the case is within the act of 1807 for the relief of purchasers at execution sales, who lose the estate by reason of the defendants having no title, is not a question here, for the bill is not

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framed with a view to such relief, and moreover the remedy given by the act is at law, and is complete there.

I have considered the case as against *Mulholland*, as the stronger of the two for the plaintiffs. Against heother defendant *Mebane* there is no pretence on which as the case is made out, a decree could rest. The bill must therefore be dismissed with costs.

PER CURIAM.—BILL DISMISSED.

ELIZABETH LASSITER v. JAMES DAWSON.

In this State the wife has no equity against her husband to have a provision made for her out of her *choses* accruing during the coverture, although he be insolvent, and no settlement has been made on her.

The petitioner, while the widow of *Josiah Byrd*, filed her bill against the defendant, her brother, who was the executor of her father, claiming a part of his residuary estate. Pending that suit she married *Craven Lassiter*, her present husband, who became a party to it. A final decree was had in favor of the plaintiffs, and the sum of $484¼ was ordered to be paid into court, subject to a further order for settling it on the petitioner. The order to pay the money into court not being complied with, the wife by her next friend filed a petition, stating the above facts, and alleging that her present husband was insolvent, had made no settlement on her, and had abandoned her without leaving her any means of support; and further, that for the purpose of defeating her of the right of having the above-mentioned sum of $484¼. secured to her, under the directions of the court, had releasit to the defendant. The prayer was that the money might be raised, and settled to her sole and seperate use. Upon this petition, an order was made directing execution to issue, under which the money was made by the sheriff and paid into court. The defendant filed an affidavit in answer to the petition, in which he admitted the execution of the release, but contended that it was given in

consideration of debts which *Lassiter* owed him, to the amount of the above mentioned sum.

W. C. Stanly & Badger, for the petitioner.
J. H. Bryan & Mordecai, contra.

RUFFIN, Chief-Justice.—We do not think it necessary to examine into the merits of the settlement between the husband and *Dawson*: For however the validity of an assignment by the husband of the wife's legal or equitable *chose* in action might depend upon its consideration, when set up in opposition to her right by survivorship to the subject then outstanding, the husband may certainly at law, release, without consideration, to the wife's debtor, and also in equity, unless she has a right in this court to have her equitable *choses* set apart as a separate provision for her and her family.—This case is brought to that point, on which the Court is more ready to place it, because the case of *Bryan* v *Bryan*, (*ante* 1 *Vol. p.* 47,) has been supposed in argument not to lay down the rule then adopted as a general principle. We have considered that case, and although some exceptions are supposed by Chief Justice *Taylor*, *arguendo*, to be under certain circumstances admissible, yet no case can be supposed which could more emphatically call for the interposition of the court, than the one then under consideration. The husband was insolvent, and had made no settlement on the wife, but had converted a larger part of the proceeds of her real estate, and she had been bred in affluence, and had brought into the family a large fortune. This was admitted by the counsel for the defendant to be an irresistible case, if the equity of the wife raised by the British courts was to be acknowledged in ours, and it seems to us that the admission was not inadvertent or beyond the truth. Yet the Court refused the relief, and that not upon the ground that the husband had released or disposed of the wife's interest by assignment, but that *Sellers* who held the fund, was a creditor of the husband to a larger amount than her share. The judgment of the court, therefore, went as far as it could do to establish the general principle:

The case of *Bryan* v. *Bryan*, (*ante* 1 *Vol p.* 47) considered, and the rule there adopted declared to be general.

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and we know that the other Judges who then sat in the court intended to adopt the rule then acted on, universally, as being appropriate to the habits of our people, and the state of our society, and a necessary result from the indefeasible interest given by our law to the wife, in the personal estate of the husband.

The same may be said of the case before us, that the merits of the wife are great, and the demerits of the husband glaring, and that the court would protect her, if we could in any case intercept the exercise of the marital rights of the husband. But the authority of the decision in *Bryan* v. *Bryan*, is conclusive against it, and therefore the petition must be dismissed, and the sum raised on the execution and now in court, refunded to the defendant.

Per Curiam.—Dismiss the petition.

Adam A. Springs v. John Wilson, *et al.*

As a plaintiff may in this State dismiss his bill without prejudice, the order for the hearing will, upon his application, be set aside upon the terms of his paying all the costs, without being reimbursed them in any event.

The plaintiff by petition, applied to have the cause remanded to Mecklenburg, for the purpose of enabling him to have the order for the hearing set aside, so that he might take further testimony.

The facts were that the bill was filed in 1820, and alleged that in 1807, the plaintiff purchased the shares of *Joseph* and *Jeremiah Wilson*, who were defendants, in the land which descended to them, and their other brothers, from their father, and took deeds from them.—That the defendant *John*, one of the brothers, after notice of the plaintiff's purchase, bought the whole land thus descended, under a fraudulent execution against the heirs of his father. That all the defendants refused to acknowledge the deeds to the plaintiff, which were then unregistered. The deeds were filed in the office

for the inspection of the defendants, and to a special interrogatory as to their execution, the defendant *John* had answered that he knew nothing about them. His answer was filed in May, 1821. In November, 1823, the cause was set for hearing: and in November, 1828, was removed to this court by consent. The petition was filed at this term, and it stated that the point to which further proof was wanted, was the execution of the deeds to the plaintiff, which had been registered by an order of the County Court, made in 1824, upon a probate taken in another State in 1807, which order and probate the plaintiff feared would not authorise the reading of them at the hearing.

Devereux, for the plaintiff.
Badger, for the defendant.

RUFFIN, Chief-Justice, after stating the facts as above proceeded.—In considering this application, the court assumes that the deeds cannot be read in their present state, and we confine ourselves altogether to the enquiry, whether the party ought now to have an opportunity of supplying the defects in the probate, and if so, upon what terms.

The rule of practice in the English chancery clearly forbids the opening of the order under such circumstances. But without condemning that rule, we are obliged to see that it would work great injustice to apply it in our courts as organized. Nor perhaps can we lay down any precise rule of practice for ourselves, considering the difficulty that parties are under in taking their proofs and preparing a case for trial. In the present case, however, the materiality of the proof has been so distinctly known to the parties, and the fact to which it relates so fully put in issue by the pleadings, that the subsequent and great delay is without excuse, and deprives the plaintiff of all right to ask for further delay, but upon the hardest terms. Our only difficulty is, whether we can grant it upon any terms. But as it is taken that in such a case, the plaintiff might, according to our course, dismiss his bill without prejudice, whereby he

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would render himself liable to the costs, the court will grant the prayer of the petition, upon the payment by the plaintiff of the costs of that, and of all the costs of the cause, of which no part will be re-imbursed to him on the hearing, whatever may be its result. This indulgence is granted, because in effect it is dismissing the bill without prejudice, with this advantage to all parties, that a final decision upon the merits will be had much sooner than if the plaintiff were put to a new bill. The plaintiff may therefore take this order, or have the cause now heard, at his election.

PER CURIAM.—ORDER ACCORDINGLY.

GOODWIN JONES, *adm'r. of* JOHN SHERRON,

v.

DRURY JONES *et ux. et al.*

The obvious meaning of words used by a testator may be controled by a natural implication arising from the circumstances under which the will was made, or the absurdities resulting from a strict construction. As where a testator deposed of all of his estate, giving the larger portion to his wife, and a smaller to a daughter, then his only child, and upon the birth of a son by a codicil declared, "I revoke and make void the said legacy to my wife," and then gave one moiety of it to his son, and made no disposition of the other. It was held that his intention was to revoke the legacy to his wife only for one half, so as to make her a joint tenant with the son.

An administrator with the will annexed, becomes a trustee for any trusts declared in the will, as much as if he had been named executor.

John Sherran, having a wife and one daughter, an only child, in September, 1831, made his will as follows: "First. I give and bequeath unto my beloved wife *Al-*"*sey Sherran*, fourteen negroes, to wit: *Jack*, *Keziah*, "*Jim*, *Lewis*, *Alsey*, *Sally*, *George*, *Owen*, *Sally*, *Har-*"*riet*, *Gumy*, *Candis* and *Henderson*—four beds and fur-"niture, three chests and tables, with all the rest of my "household and kitchen furniture, stock of horses, cat-"tle, hogs and sheep. Further, I give unto my wife *Al-*

"sey *Sherran* the tract of land whereon I live, contain-
"ing two hundred and twenty-eight acres: also, another
"tract adjoining, containing four hundred and sixty-
"six acres, and lying on the Cedar prong of Little ri-
"ver, together with all my plantation farming utensils.
"Item, I give unto my executors and unto their survi-
"vors, the tract of land called the river tract, contain-
"ing one hundred and forty-six acres, also four negroes,
"to wit: *Violet*, *Gill*, *Lesha* and *Bob*, one bed and fur-
"niture, three head of cattle, one loom, for the sole and
"separate use of my daughter *Polly Barham*, without
"being under the control of her husband, or subject to
"pay his debts. If she should survive her husband, I
"give the property absolutely to her. If she should
"die during the life of her husband, my will is that the
"property be equally divided between all her living
"children, except *Woody Barham*.

"Lastly, my will and desire is that the honorable
"court of my county, appoint some fit and proper per-
"son or persons to perform this my last will and testa-
"ment, as I hereby revoke all former wills by me made."

Afterwards, upon the birth of a son, on the 15th day of September, 1832, he added the following codicil:—
"I, *John Sherran*, of Wake county, do make this codi-
"cil to be taken as part of my will and testament, as
"follows: that is to say, whereas I have by said will
"given to my wife *Alsey Sherran* fourteen negroes and
"two tracts of land including the tracts whereon I live,
"(i. e. my residence,) now I do revoke and make void
"the said legacies to my wife, and I do hereby give and
"bequeath unto my son *Wesley* half of the said fourteen
"negroes and tracts of land, which I have given my
"wife *Alsey* by my said will, including a negro girl
"left out of my former will, by the name of *Liz*, in the
"place of a negro man *Jim*, sold by me since the exe-
"cuting my former will; also half of the residue of my
"property named in said will, and left to my wife. I
"further give to be divided, two infant negroes *Marcy* &
"*Matsy*, born since the executing of my will, between
"my son *Wesley* and my wife *Alsey*."

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The widow of the testator, after his death, married the defendant *Drury Jones*. Administration with the will annexed, was committed to the plaintiff. All persons interested under the will were made defendants, and the prayer of the bill was that the plaintiff might be instructed as to its proper construction; *Barham* and wife contending that there was an intestacy as to half of the legacy given the wife by the will. There was also a prayer for declarations whether the plaintiff by his appointment as administrator became trustee for the wife of *Barham*; and in what proportions the defendants were entitled to the crops made upon the land of which the testator died seised.

W. H. Haywood, for *Jones* and wife.

Manly, for the other defendants.

Gaston, Judge.—The principal question in this case is, whether the testator has by the codicil to his will, revoked altogether the devises and bequests which he had made to his wife, or has revoked those dispositions only as to a moiety of the property so given, and which moiety is, by the codicil, devised and bequeathed to his son *Wesley*. After reciting the devises and bequests to his wife, the words of the codicil are, "now I do revoke and make void the said legacies to my wife."—These words taken by themselves, leave no room for construction—they express an absolute and entire revocation of "the legacies" referred to, and they must be taken in their legal sense, unless by the context considered in reference to the nature of the property, and the state of the testator's family, they *clearly* appear to be otherwise intended. But the literal and technical force of words in a will may be counteracted by rational implication; this implication may be collected from other expressions in the will throwing light upon the intention; the state of the testator's family, at the time of making the will, may, when a rational doubt occurs as to its meaning, be also taken into consideration, and the absurdities, improbabilities and inconsistencies which arise from a literal interpretation may either furnish or

assist in furnishing a sufficient reason to adopt another construction. We think that in this case, there are so many concurring and strong indications that the words above recited, were used inaccurately, as to authorise us to declare judicially, what as individuals we cannot doubt, that the codicil was designed to revoke the gift of property to his wife, so far, and so far only, as to make way for the disposition to his child of a part of that property. At the date of the will he had one daughter, and no other child. He makes what he considers an adequate provision for this daughter, and takes care to place this provision beyond the power of her husband, by securing it to her separate use during the coverture, and should she die before him, then to her children; and he gives the mass of his property to his wife absolutely and forever. In the course of a year thereafter a new claimant on his bounty comes into existence. He has a child for whom he had made no provision. Then is this codicil executed, and it is impossible not to see that the primary and *sole direct* object of the codicil is to provide adequately for this child, and that whatever else is done is incidental and subservient to this purpose. He cannot effect his object without diminishing the gifts to others, and that in favor of his wife furnishes the fund to which he would naturally resort. The mass of his property had been given to her; the being to be provided for was *her* child as well as *his*—she had lost none of her hold on his affection because of this new link of their union: but it was fair that she should divide with her son the liberal bounty of her husband. Accordingly he leaves the disposition made with respect to his married daughter wholly untouched—neither increases nor diminishes its amount, nor changes the modifications for its safe enjoyment, but gives to the infant son *half* of the negroes and lands given to his wife by the will, and half also of all the residue of the property thereby given her, including the beds, chests and tables, cattle, hogs and sheep. The codicil is silent as to the disposition of the other moiety of this property, and if we are to understand him as revoking *in toto* the devises and bequests

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to his wife, he meant to die intestate as to this moiety. He must have known, that in that event it would become distributable by law. If the meaning of the codicil be ascertained, however inconsistent its provisions, they must have effect, but it is almost impossible to believe that a rational man *intended* this partial intestacy—that after giving a moiety in express terms to his son, he intended that this son should also take a half of the other moiety—that he intended that the husband of his daughter, whom he had excluded from the power of deriving benefit from all which he had expressly given to his daughter, should be able to possess himself of the other half of this moiety—that he intended such subdivisions to take place in negroes, tables, chests, beds, and all the *et cetera* of perishable articles; and that he *meant*, as a full and adequate provision for his widow, in lieu of dower and distributive share, when he well knew she could dissent from his will, *an undivided moiety* of two little negroes, the eldest not more than a year old! It may be questioned however, whether the absurdities of this supposition would of themselves be sufficient to overrule the literal meaning of the words of revocation, in as much as of themselves they do not distinctly point out the true meaning of these words, nor the extent of such revocation. But the codicil itself, demonstrates the testator's meaning, as satisfactorily I think, as though it had declared such meaning in appropriate terms. The testator takes notice that he had sold one of the negroes named *Jim* left to his wife by the will, and that he has a negro named *Liz*, which he had left out of that will altogether. He therefore adds in this codicillary bequest to his son, after the gift of a half of the lands & negroes left by the will to his wife, these words "including the negro girl *Liz, in the place* of the negro man *Jim*." The obvious inference to be drawn from these expressions is, that the gift in thatwill was not entirely made void by the codicil, nor so regarded by the testator, but was recognized as still subsisting, and revoked so far, and so far only, as to give way to the dispositions made by the codicil. Here too, we may remark, that the tes-

tator, perceiving that he had omitted to dispose of the negro *Liz* by his will, undertakes to supply that omission by his codicil. Is it conceivable that in performing this undertaking he should give *half* of this negro, *intending* to leave the omission unsupplied as to the other moiety? Consider the bequest to his wife revoked only so far as it conflicts with the disposition to his son, and the substitution, or as he terms it, the "including" of *Liz* in the place of *Jim* renders the whole consistent and rational. But after all this, follows another bequest, which ought to remove any lingering scruple as to the testator's intention. Two children had been born of the negroes given by the will to his wife, since the date thereof, and of course would not pass by virtue of that bequest, as modified by the codicil, to his wife and the infant child, along with the parent stock. To avoid this inconvenience, and to secure to her and her child, this fruit of the principal donation, he adds— "I *further give to be divided* two infant negroes, born since the execution of my will, *between my son Wesley, and my wife Alsey.*" The cases of *Edleston* v. *Speake*, and *Onions* v. *Tyrer*, (*Show.* 89, 1 *P. Wms.* 343,) have decided that where an express revocation is made of a previous testamentary disposition, and in the revoking instrument another disposition is made, and the court can discover that *the object* of the revocation is to make way for this second disposition, if *this* cannot take effect, there shall not be a revocation. The principle of these decisions bears us out, I think, in interpreting the express words of revocation here, as extending no further in the intent of the testator, than making way for the substituted disposition, in the same manner as though he had, after the revoking clause inserted the words, "that is to say as follows."

A codicil by which the testator intended to revoke a former, and make a new disposition of property, is not effectual as a revocation, unless it be effectual as to the new disposition of the same property.

The crops growing upon the lands devised by the testator, according to the construction which the court has given the will and codicil, passed with the lands to the devisees.

Crops growing upon land, at the death of the devisor, go to the devisee.

The defendants *Drury Jones* and wife, being tenants in common with the defendant, *Wesley Sherran*, are ac-

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countable to this defendant for a moiety of the profits made by the use of the common property.

The plaintiff by accepting the appointment of administrator with the will annexed of the testator, has become a trustee for the defendant *Polly Burham*, to the same extent as if he had been nominated executor in the will, and had accepted of the appointment.

The court has not been called on by the parties further than to declare its opinions upon these questions.—This declaration will be made, and the parties may then proceed as they shall be advised.

PER CURIAM.—DECREE ACCORDINGLY.

JOHN C. GOODE v. JOHN D. HAWKINS, *et al.*

Persons may be permitted to unite in an association, by which one shall bid at a public sale for the benefit of all concerned, when the motive for such association is not dishonest, nor the object nor the effect of it to produce an improper result.

A wrong done by a person seeking equitable relief, to one not a party to the proceedings, furnishes no objection to such relief on the part of those against whom it is sought.

When an objection to equitable relief is based upon an allegation of *fraud*, it will not be sustained by proof of mere *error*.

The case, upon the bill, answer and proofs was, that one *William Hunt* filed his bill against *John D. Hawkins, Richard Boyd, Francis A. Thornton and Henry Fills*, wherein he charged that a *fi. fa.* which had issued from the Superior Court of Granville, directed to the Sheriff of Warren, against *Alexander Boyd*, had been levied on a certain tract of land as the land of the said *Alexander*—that previously to the *teste* of that execution, the said *Alexander* had conveyed this land to the defendant *Fills*, in fee simple upon certain trusts for the indemnity of the defendants *Richard Boyd* and *Thornton*—that doubts having arisen, whether in law this conveyance had priority

to the lien of the execution, and it being a matter of importance not only to the creditors in the execution, and to the said *Alexander*, but also to the defendant *Richard Boyd*, who was surety of the the said *Alexander* for the debt on which the aforesaid judgment had been rendered, that all such doubts might be removed, in order that the sale might be for a full price, it was explicitly agreed and declared, on the part of the defendants *Boyd*, *Thornton* and *Fitts*, that all claim under the said deed should be waived and relinquished—that upon the faith of this declaration, *Hunt* became the purchaser of the land upon the execution sale, and paid the full price thereof—that subsequently the defendant *Fitts*, by the direction of the defendants *Boyd* and *Thornton*, had assigned and transferred his legal interest in the said land, under the aforesaid deed of trust, to the other defendant *Hawkins*—that the said *Hawkins*, combining with the other defendants, was about to evict the plaintiff *Hunt* from the said land by virtue of the title derived under the deed of trust, notwithstanding it was perfectly known to all of them that the plaintiff had purchased at the execution sale, in consequence of the explicit abandonment by the other defendants of any title under the said deed, and of their full consent that the land should be applied to the satisfaction of the judgment which was discharged by the purchase.

The plaintiff prayed for an injunction, a conveyance from the defendant *Hawkins* of all his estate under the said deed, and for general relief.

The material facts thus charged were admitted in the answers; but at the same time the defendants averred that the present plaintiff *John C. Goode* was the beneficial owner of the judgment against *Alexander Boyd*, and was jointly interested with *Hunt* in the purchase made at the execution sale----that the said *Goode* had, since the rendition of the said judgment, at sundry times oppressively and usuriously extorted from the said *Alexander*, sums of money exceeding lawful interest, as a consideration for forbearance and indulgence thereon; and that the agreement of the defendants *Richard Boyd*, *Thornton*

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and *Fitts* to permit the land to be sold under the execution, and to waive the title to it under the deed of trust, was obtained by gross and fraudulent misrepresentations of the said *Goode*, whereby they were made to believe that an original execution had issued, of a date anterior to that of the deed of trust, the lien whereof attached to this land, and that this lien had been preserved unbroken by a series of *alias* executions, duly and regularly sued out thereafter.

Hunt's bill was afterwards permitted to be amended. In the amended bill, he distinctly charged that the purchase made at the execution sale was made for and on account of himself and *Goode* jointly, on an agreement to divide the land equally between them. To this amended bill he made *Goode* a party defendant; and he modified his prayer for relief by asking for a conveyance from the defendant *Hawkins* of an undivided moiety only. The original defendants, except *Hawkins*, relied on the matters set forth in their former answers. *Hawkins* submitted to make *Hunt* a conveyance as to *his* moiety. *Goode* answered the amended bill, and admitted all the allegations of the plaintiff. *Goode* then also filed his bill in the nature of a cross-bill, in which he utterly denied all usurious and oppressive dealings towards *Alexander Boyd*, on the judgments against him---insisted that the agreement for the waiver of title under the deed of trust, as against the execution had been made upon a fair exposition of all the facts as to his judgment, and the execution thereon from time to time issued, & without any fraud, misrepresentation or deceit on his part, and prayed that a conveyance might be made to him of the other undivided moiety of the land. To prevent delay, and save prolixity of pleadings, the parties all agreed that the answers of the defendants *Boyd*, *Thornton*, *Fitts* and *Hawkins* to the bill of *Hunt* should be considered as their answers respectively to the bill of *Goode*, and *Hunt's* amended bill as his answer to *Goode's* cross-bill. All irregularities in the forms of proceeding were waived by general consent of all the parties. A decree had been before rendered for *Hunt*, so that the controversy was now between *Goode* and the other parties.

Devereux, for the plaintiff.

Badger & W. H. Haywood, contra.

Gaston, Judge.—After stating the case as above, proceeded:—Three objections have been urged on the hearing against the plaintiff *Goode*. In the first place it is objected, that the agreement between him and *Hunt*, whereby they were to be equally interested in the purchase made by the latter, was one in fraud of public policy, as calculated to prevent competition at the sale, and to deceive those present at the sale and ignorant of that agreement. Secondly, it is insisted that his oppressive and usurious exactions from *Alexander Boyd* for indulgence on the judgment, for the satisfaction of which the land was sold, deprive him of all claim to the aid of a court of equity, for making good his purchase at such sale. And thirdly, it is contended that the waiver of title under the deed of trust was procured by fraud, and that he who was guilty of that fraud shall not be permitted to take the advantage of such waiver.

Not having been present at the argument of *Hunt's* bill, I do not know whether the objections now urged were then made, or if they were then made, what were the reasons which induced the court to overrule them. It is probable, however, from the submissions in *Hawkin's* answer to *Hunt's* amended bill, that there was no opposition to this decree. But it would seem that the objections, if valid against one of the plaintiffs, were valid against both. Whatever may be the forms of the transaction, *Hunt* and *Goode* purchased jointly by one and the same act, had one and the same title to relief; instead of being arrayed on different sides of the controversy, ought to have been joined as plaintiffs in the same bill, and are liable to have their claim repelled by one and the same defence. If the purchase were designed to stifle, or necessarily tended to stifle fair competition—if one of the parties in the association cannot be admitted to join in insisting on the purchase—if the waiver of the outstanding title to the land were procured by the fraud of a partner in the transaction—the *purchase* could

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No one can in equity, be permitted to set up a benefit derived through the fraud of another, although he may not have had a personal agency in the imposition.

not stand, and ought not to be aided in a court of equity. No one can there be permitted to set up a benefit derived through the fraud of another, although he may not have had a personal agency in the imposition. (*Huguenin* v. *Basely* 14 *Ves.* 238.) Still less can one of two joint contractors ask to *sever* the contract, and let him have the benefit of *half* of the bargain, in order to escape the pollution with which the fraud of his companion has tainted the entire transaction.

As it is probable however that the objections now urged were not pressed on the hearing of *Hunt's* case, we have examined, and considered of these objections as wholly unaffected by the adjudication then made.—The first relies on the fact that *Goode* was concerned in the purchase made by *Hunt*, and that this interest was not proclaimed at the the time of the bidding.—We are unaware of any judicial decision, by which such a connection in a purchase at execution, or other public sale, is denounced as a fraud, nor do we find ourselves warranted by fair inference from any established principles in pronouncing so sweeping a denunciation. The case of *Smith* v. *Greenlee* (2 *Dev. Rep.* 126) referred to in this part of the argument, certainly contains no *adjudication* to that extent. So far from it, this court reversed the judgment below, and ordered a new trial from an apprehension that the *language* of the judge's instruction might have induced the jury to think that all agreements to buy on joint concern at execution sales, were unfair. Whether any question might be entertained of the correctness of the doctrine asserted in that case as applied to the trial of an *ejectment* in a court of law, we have none of its soundness as applicable to the controversy here, and for that purpose adopt altogether the principles which it sanctions. If an agreement for one to bid on behalf of himself and others, be made to stifle, paralyze or discourage competition, those concerned in such an association shall not be permitted to derive benefit from a sale, the fairness of which has been thus violated. But persons may legitimately unite in an association, by which one shall bid for the

benefit of all concerned, when the motive for such association is not dishonest, nor the object, nor the effect of it to produce an improper result. The act does not necessarily imply a dishonest motive, an improper end, or an injurious consequence. If by reason of these, the act should be repugnant to fair dealing, then he who objects to it because of such repugnancy, must *allledge* and *prove* the matters which render it liable to be thus impeached. It appears to us that this has not been done on the part of the defendants in the present case.

We deem it unnecessary to enquire whether the second objection has or has not been sustained by proof. If clearly established, we do not perceive how a wrong done by the plaintiff to *Alexander Boyd*, can furnish a justification to the defendants in now setting up against the plaintiff a title to the land which at the time of the purchase, they explicitly waived. *Goode* is asserting no equity, and asks no relief against *Alexander Boyd*. The latter is no party to the present proceedings. What is the true state of the monied transactions between *Goode* and *Alexander Boyd*, or between the former and the sureties of the latter, *as such*, is not here in contestation, cannot here be settled, and is in no way material to the decision of the equity which *Goode* sets up, to have a legal title removed out of the way of his purchase at the execution sale. He claims relief against those who set up this legal title, and upon the ground of their agreement. They may rightfully insist on any opposing equity which they have against him, but they cannot insist that he shall redress the wrongs of *Alexander Boyd*, before he shall be heard to complain of the wrongs which they have inflicted, or threaten to inflict on him.

The principal objection in the case remains to be considered. As far as we can ascertain the facts upon which this objection rests, they appear to be these: At the May term, 1822, of Granville County Court, the judgment of the executors of *William Smith* to the use of *Goode*, was rendered against *Alexander Boyd* and *Spotswood Burrell*, for about the sum of $9000 on a bond in which the said *Alexander* was principal, and *Burrell*,

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the defendant *Richard Boyd*, and others, were sureties. The first execution on this judgment was a *fi. fa.* directed to the Sheriff of Granville, tested of the first Monday of November, 1822. On this, $1851 was paid by the defendants, and the execution stayed for the balance.—Writs of *fi. fa.* directed to the sheriff of the same county were regularly made out, issued and delivered to the said sheriff, and by him returned "indulged," which were tested the first Mondays of February, August and November, 1823, and of February, 1824. There was also a writ of the intermediate term, May 1823, and tested of the first Monday of May, made out but not delivered to the said sheriff. An execution tested the first Monday of May, 1824, was then directed to the sheriff of Warren, and by him levied on certain slaves, and this tract of land. After the rendition of this judgment, and after the teste of the second execution, viz: on the 18th February, 1823, the deed of trust to *Fitts* for the security of *Richard Boyd* and *Thornton* was made. This deed was proved in April, 1823, and was afterwards registered, but the time of such registration does not appear. I presume, however, that it was registered shortly after its probate. A legal question arose, whether the land conveyed by this deed of trust was subject to be sold under the execution—and at the Warren County Court in May, 1824, *Goode*, *Alexander Boyd*, *Richard Boyd*, *Thornton*, the sheriff of Warren and many others being present, the opinion of *Robert H. Jones*, Esq. a respectable lawyer of that county, was asked. *Goode* stated that his judgment was prior to the deed of trust—that his first execution was prior to it, and that this had been kept alive by executions regularly issued every term thereafter. This statement was not contradicted by any person, and was expressly confirmed by *Alexander* and *Richard Boyd*. Mr. *Jones*, thereupon, without any further inquiry, decided that the execution then in the sheriff's hands bound the land notwithstanding the deed.—*Goode*, *Richard Boyd* and *Thornton* then agreed, to which agreement *Fitts* assented, that all claim to the land under the deed would be waived as against the execution,

upon *Goode's* consenting that the sale should be made for Virginia notes at par, and North Carolina notes at 6 per cent. discount. Upon this agreement the sales were made.

These facts do not, in the opinion of the court, establish the allegation of fraud and misrepresentation against the plaintiff, nor justify the defendants in now setting up title under the deed of trust, to defeat his purchase at those sales. The charge of fraud rests on the falsehood of *Goode's* assertion, that the lien of his first execution had been *duly* and *regularly* continued by those subsequently issued. This assertion, say the defendants, was false, for all the executions prior to the last having been directed to the sheriff of Granville, the execution directed to the sheriff of Warren did not relate to any of the former, so as to bind the property of *Boyd* in Warren county—and it was also false in this, that one of the Granville executions, that of May 1823, was never delivered to the Sheriff, but remained either in the clerk's office, or in the hands of *Goode*. It is not pretended that the plaintiff's *opinion* upon any *legal* question was either desired, or required, or relied upon by the parties. For the determination of questions of *that* character, Mr. *Jones* was appealed to. If there was any error in his decision, this error is attributable to the plaintiff so far only as he may have occasioned it by a misrepresentation or suppression of material facts. Mr. *Jones* did not require to be informed whether the executions preceding that then in the hands of the sheriff had been directed to the sheriff of Warren, or to the sheriff of Granville, nor whether these preceding executions had been actually placed in the hands of the sheriff to whom they were directed. It is no imputation on Mr. *Jones'* professional reputation that he did not make these enquiries, for unquestionably until long afterwards, till the decision of the case of *Den ex dem. Hardy* v. *Jasper* (3 *Dev. Rep.* 158,) many of the first men of the profession held that an *alias fi. fa.* to whatever sheriff directed, bound all the property of the debtor against *his alienations*, from the test of the first *fi. fa.* and it is not yet settled, nor

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are we prepared now to decide that, as against the defendant in the execution and his *aliences*, the lien of the original *fi. fa.* is lost, because an *alias* properly directed, was not put into the sheriff's hands. The case of *Palmer* v. *Clark* (2 *Dev. Rep.* 354) expressly confines the adjudication to disputes for priority between conflicting execution creditors. Had Mr. *Jones* deemed these enquiries material, he would have made them. Neither he, nor any other witness testifies that the plaintiff stated any *specific fact* untruly. The defendants in their answers, charging the plaintiff with fraud and misrepresentation in the strongest terms specify *no fact* which was falsely alleged by him. *Richard Boyd* avers that the plaintiff exhibited a statement from the clerk of Granville County Court, shewing what executions had been sued out, and there is no evidence to prove that such statement varied in effect from the transcript which has been exhibited to us. *Alexander Boyd* and *Richard Boyd*, says Mr. *Jones*, confirmed *Goode's* statement. Can there be a question that both these, and especially the former, who had repeatedly obtained indulgence from the sheriff of Granville by arrangements with *Goode*, well knew that the former executions had been directed to that sheriff? *Clanton*, the sheriff of Warren, was one of the persons present and privy to the enquiry, and he *knew* that the execution then in his hands, was the first that had come to him. The executions had all issued from the court of the adjoining county—the clerk's office was within a day or a half a day's ride—the facts were accessible to all interested in the subject, and we have no proof to induce us to believe that these parties were under the slightest mistake with respect to *any of these facts*.—That they were in error with respect to the legal result of these facts, is sufficiently shown. It is unnecessary, however, to enquire whether in any case an agreement may be set aside because founded in such error. The defence is rested on the ground of *fraud*, and will not be upheld by proof or error. But if it could, we deem it obvious that the agreement to waive the title under the deed of trust, was not produced *solely* by the convic-

tion that such title was bad as against the execution.—*Richard Boyd* was solicitous to make the arrangement, because *Goode* would otherwise, insist on selling the negroes for specie, and being liable on *Alexander Boyd's* bond, as one of his sureties, he was anxious that the negroes should bring full prices. It appears that *Thornton* was reluctant to enter into it, but he yielded according to his own statement, because of the double motive, that he relied on *Goode's* representation, that the execution had a prior lien, and that as *Richard Boyd* had consented, *he would not be obstinate.* The very arrangement to waive the claim, is evidence that its *invalidity* was not *certain.* The stipulation with the plaintiff in regard to the terms on which the property should be sold, if the title were waived, constituted a consideration for that waiver, assuredly of *some*, and possibly of *great* weight. *Richard Boyd* probably, judging from the evidence, would gladly have acceded to the arrangement, had Mr. *Jones* expressed no opinion upon the question of the title, and it has not been shown that Mr. *Thornton suffered* by yielding his objections to the arrangement, after learning that it was acceptable to *Richard Boyd.*

Per Curiam.—Decree in favor of the plaintiff, with costs against the defendants *Boyd* and *Thornton*, who must also pay the costs of the defendants *Hawkins* and *Fitts.*

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HENRY KORNEGAY, AND STEPHEN BRYANT, *et ux.*
v.
SUSANNAH CARROWAY, BRYANT CARROWAY, *et al.*

If the specific relief prayed, cannot be given, proper relief may be had under the general prayer, but this relief must be consistent with the frame of the bill; and where the plaintiff claimed slaves as absolute owner, and upon the proofs it appeared that he was entitled in remainder, after an interest for the life of the defendant, the plaintiff cannot abandon his prayer for relief as owner, and obtain security as remainder man.

The allegations of the bill were, that the plaintiff *Kornegay*, conveyed five slaves to the defendant *Susannah*, his mother-in-law, upon an agreement that she should reconvey them to several members of his family. That the defendant *Susannah* conveyed one of them named *Lucy* to *Mary*, the daughter of the plaintiff *Kornegay*, and the wife of the plaintiff *Bryant*. That she afterwards conveyed the remaining four to the wife of the plaintiff *Kornegay*—that the latter assented to these conveyances, and that the deeds were left with him for the purpose of being proved and recorded. That the defendant *Susannah*, before the deeds were registered, got possession of them, and through the persuasion of the other defendants, destroyed them. That the defendants then enticed the slaves from the possession of the plaintiff *Kornegay*, where they had always remained, and carried them away, and sold them to persons unknown to the plaintiff, and had appropriated the money for which they sold to their own use.

The bill prayed for a discovery, and account of the sums raised by the sale of the slaves, and for general relief.

The defendant *Susannah* admitted the conveyances as stated in the bill, but insisted that the deeds executed by her to the wife and daughter of *Kornegay*, contained a reservation to himself, of a life-estate in the slaves.—She admitted that she did, with the consent of the wife of *Kornegay*, obtain possession of the deeds, and that she destroyed them—that her reason for so doing, was, that *Kornegay*, under pretence of procuring her to exe-

cute a letter of attorney to him, had obtained a deed conveying all her estate to him, and had defrauded her out of the whole of it.

Upon replication taken to the answers, the proof was, that the deeds executed by the defendant *Susannah*, to the wife and daughter of *Kornegay*, were dated the 10th of October, 1824, and contained a reservation of the use of the slaves for the life of the donor.

W. C. Stanly & Mordecai, for the plaintiffs.

Henry & Devereux, for the defendants.

DANIEL, Judge.—After stating the pleadings and proofs as above, proceeded.—It appears that the case made by the bill, is a very different one from that made by the proofs in the cause. If the case made by the bill, had been supported by proofs, the plaintiffs would have been entitled to relief on the special prayer in the bill to have an account of the value of the slaves, after the defendants had spoliated the title deeds, and taken the slaves away, and sold them to persons unknown. In that case, there would have been no necessity to have made the wife of *Henry Kornegay* a party plaintiff to the bill, because an absolute deed for slaves or other personal property to a *feme covert*, and assented to by the husband, would have vested the title in him, when the slaves or other property should have been reduced into possession. (1 *Thomas Coke*, 132, 133. The bill states that the deeds were absolute, and that the husband had reduced the slaves into his possession. They would seem then to be his property: but the evidence in the case shows that the deeds were executed subsequent to the passage of the act of Assembly, authorising slaves to be limited by deed, as they might have been previous to the passage of the act, by way of executory devise in last wills and testaments; and the evidence further shows, that *Susannah Carroway* reserved to herself a life estate in the said slaves, which reservation, with a limitation over to the wives of *Stephen Bryant & Henry Kornegay*, after the death of the tenant for life, was good in law, both

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as to the life estate, and also as to the limitation over. By the case made, according to the proofs in the cause, neither *Henry Kornegay*, or his wife had a right to the possession of the slaves until the death of Mrs. *Carraway*, the tenant for life. If therefore, it become necessary for the parties to apply to a court of equity for relief concerning the said slaves, or any interest arising out of the sales of the same, previous to the death of the tenant for life, it would be essentially necessary that the wife should be a party to the bill, if she was alive, and if she was dead, it would be equally necessary that her administrator should be a party, because by the deed being executed to her, the limitation after the life estate, inured to her, and not to the husband. The general rule of law is that *choses in action* which are given to the wife, either before or after her marriage, survive to her upon the death of her husband, provided he has not reduced them into possession. (*Richards* v. *Richards* 22 *E. C. L. R.* 119. 121.) In (*Garforth* v. *Bradley*, 2 *Ves.* 675,) Lord *Hardwicke* says, that when a *chose in action* comes to the wife, whether vesting before or after marriage, if the husband die in the life time of the wife, it will survive to the wife, with this distinction, that as to those that come during the coverture, the husband may for them, bring an action in his own name, and may disagree to the interest of the wife, and that a recovery in his own name, is equal to reducing into possession. But in this case *Susannah Carraway* having a a life estate in the slaves, by virtue of the deeds which limit the remainders to the plaintiff *Henry's* wife and child, it would have been impossible for him legally to have reduced the slaves into possession during the continuance of the life estate, if the slaves had not been sent away. If therefore, during the life of Mrs. *Carraway*, it should so happen that *Henry*, the husband, should die, the right to the slaves would survive to the wife. (*Hines* v. *Lewis' Executors*, *Taylor*, 44.) So on the other hand, if the wife should die during the life of Mrs. *Carraway*, and then she should die, the administrator of the wife, and not the husband, should bring the action

A deed to a *feme covert*, conveying slaves to her after the death of the donor, creates an interest which survives to her after the death of her husband, and she is a necessary party to a bill by him, seeking relief upon her title.

The cases of *Hines* v. *Lewis*, (*Taylor's Rep.* 44,) and *Whitbie* v. *Frazier*, (1 *Hay.* 275,) approved.

to recover the slaves. *Whilbie's Administrator* v. *Frazier*. (1 *Hay*. 275.) The slaves having been turned into money by the conduct of the defendants, does not alter the rule as respects making the wife a party to a bill brought to secure the fund. In this case she is not a party, and we think the husband cannot proceed without her, if she is alive, and if she is dead, it is equally necessary that her administrator should be a party.—If the want of a wife as a party, was the only objection to this bill, the court would order the case to stand over, and give leave to amend, by making the necessary parties; but it appears that the case stated in the bill is quite different from the case made by the proofs, and the plaintiffs cannot proceed without additional parties, and a quite different case made in the bill, to correspond with the proofs in the cause. The present bill is framed upon a supposition that the deeds for the conveyance of the slaves had been unconditional and absolute, and that the plaintiffs were, in consequence of the destruction of their title papers, and the asportation of the slaves, entitled to a decree, for an immediate account of the value of the said slaves. Whereas the case made by the proofs in the cause, could only entitle the plaintiff and their wives to entertain a bill for relief, so far as to have a decree that the slaves and their increase be restored to the wives of *Kornegay & Bryant*, on the death of Mrs. *C.* the tenant for life, or a decree for securing the fund in case the slaves could not be obtained on the determination of the life estate.

It is a rule in equity, that if relief cannot be given under the prayer exactly as prayed, contained in the bill, the court will assist the particular prayer under the general prayer, but relief inconsistent with the specific relief prayed, cannot be given under the general prayer, unless when a bill is filed by an infant, who may have a decree upon matter arising upon the state of his case, though he has not particularly insisted upon, and prayed it by his bill. *Walpole* v. *Oxford*, (3 *Ves*. 416, *Grimes* v. *French*, 2 *Atk*. 141, 12 *Ves*. 48. 13 *Ves*. 114 *Stapleton* v. *Stapleton*, 1 *Atk*. 6, 2 *Mad. Ch*. 171.) In the

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case before the court, no relief could be given under the general prayer, but what would be inconsistent with the particular prayer contained in the bill, viz: an immediate account, and therefore this court could not help the plaintiff, under the general prayer, if all proper parties were before it. We take no notice of an objection made at the hearing, that the bill was multifarious, because if this objection were well founded, it should have been made in the pleadings. The plaintiffs cannot get along without their bill being entirely remodeled, as well as the making the wife of *H. Kornegay*, a party plaintiff. We feel ourselves under the necessity of dismissing the bill, which is accordingly done, without prejudice to the rights of the parties, and without costs.

PER CURIAM.—BILL DISMISSED.

SAMUEL CLARKE v. JOHN CLARKE *et al.*

Where an executor raised money and bought the slaves of his testator at execution sale, and after repaying the purchase money, conveyed them according to the terms of the will, *it was held*, DANIEL, Judge, dissenting, that they were liable to the claims of other creditors.

The bill was filed in 1828, and charged that *Henry Selby* gave his estate, by his will, to his widow *Sally* and his children, who were the defendants, and died in 1812—that his widow administered with the will annexed and conveyed all her share to the other defendants, and had since died—that there was now no administrator upon her estate, or her late husband's: but that the defendants were in possession of the estate both real and personal, to a considerable value, under the will—that the plaintiff became the surety for the testator in a bond on which he had been recently sued, and a recovery effected, which he had discharged, and for which he could not have remedy at law, because there is no

administration as above mentioned, and because the widow died insolvent after having assented to the legacies to the children, and the latter gave no refunding bonds. The prayer was for an account of the estate and satisfaction of the debt.

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On behalf of *Margaret Selby*, an infant defendant, and a ward of *John Selby*, an answer was put in by her guardian, in which she denied that she claimed or had ever received any estate under the will, and in any manner from her father. It was alleged that *Henry Selby* died greatly indebted, and that under executions against him or his administratrix, all his slaves were sold, and purchased at a full price and fair sale, by *William Ross*, who afterwards sold part of them to reimburse himself the cost, and conveyed the residue to *John Selby*, as the guardian and trustee of the children and legatees of the testator, under which *John Selby* held them for some time, and then divided them among the children and allotted some to her. It was insisted that the sale was a fair one, and that *Ross* purchased with his own money, and with the view of befriending the children, and therefore made the conveyance, and that the property was not further liable to the creditors of the testator.

This defendant since her answer was filed had intermarried with *Thomas Hanrahan*, who was made a party and took the deposition of *John Selby* in support of the answer formerly put in by him for *Margaret*, his ward.

The answers of the other children were at first drawn in conformity with the statement contained in the answer of *Margaret*, but were altered before being sworn to, and admitted that the negroes allotted to them in the division were received by them as legatees.

It appeared fully upon other depositions and exhibits, that *William Lavender* was the agent of the widow to manage the estate, and finding it pressed with executions and believing that unless sacrificed, it would pay all the debts and something be left for the children, did, in order to prevent a sacrifice, borrow $5,000 and place the same in the hands of *Ross* to pur-

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chase such of the negroes as should not go for the full value, under an agreement that *Ross* should hold the title as a security for the loan, and when that should be discharged by the hire and re-sale of a part of the slaves, and all the debts paid, that he should convey the slaves that might remain to the legatees. That Mr. *Lavender* reduced the debt to about $2000, and then by his request, *Ross* conveyed all the slaves to *John Selby* in trust to pay that balance and hold the residue for the children, between whom, after satisfying the debt by hire and sale, he divided twelve negroes in 1825, which he put in their possession respectively. When the conveyance was made to *John Selby* he had become the agent of the widow and received from Mr. *Lavender* all the accounts of the estate with full information of the return of the title, and also took from the widow an assignment of all her interest for the benefit of the children. These circumstances were explicitly stated by Mr. *Lavender*, and as to the facts, were substantially admitted by Mr. *Selby*, who differed only in this—that he considered this conveyance to himself and the purchase by Mr. *Ross* as changing the character of the property so that it was no longer liable to the debts of the testator, but exclusively in trust for the children.

Devereux, for the plaintiff.

W. C. Stanly, Bryan & Winston, for the defendants.

RUFFIN, Chief-Justice.—After stating the pleadings and proofs as above, proceeded as follows:—The only question made in this cause arises on the answer of Mrs. *Hanrahan*; for all the other defendants, with becoming fairness, decline any defence, founded on the idea that they do not hold as legatees. They admit they do.

As far as I can understand the truth of the case, the resistance of the other defendant must be unavailing.—It is not necessary to enquire even whether an executor or the agent of an executor (for they stand in the same relation to the estate and are alike affected by the rule of policy) can purchase at a sale under execution, where it clearly appears that he purchased with his own

means, for a fair price, and was purchasing for himself. Upon that proposition I have, at least, a strong inclination to the negative; for the same reasons apply to a sale by execution as to one by the executor. The ground is not in either case that he cannot get a title under the sale, as he had it before. That has been sometimes said, but it is rather a quaint illustration than a satisfactory argument. The true reason is the relation of the executor to the property. He knows its qualities, the situation of the estate and the approaching necessity for a sale, and may be tempted to make advantages by allowing an execution sale. But even at such a sale, it is the duty of an executor to aid in getting the best price as if the property were his own; and it is obvious that much may depend upon full representations of the value of the several articles and upon fair efforts to gain bids. But as a purchaser, his interest is the other way and directly in conflict with his duty and with the interest of the estate. Upon principle it seems to me therefore, that such a sale cannot stand in this court, except at the election of all interested. But in this case the purchaser disavows in express terms all interested motives on his part, and declares that he bought to prevent a sacrifice of the estate, and took a conveyance to Mr. *Ross* as a trustee only as a security for the advance. He states that there was no intention to defeat creditors; but the object was to pay all the debts and then convey the residue to the children. It does not appear that there are any debts but that to the plaintiff, and that seems not to have been known then or when the deed was afterwards made to *John Selby*. According to that statement, a purpose of the purchase was the benefit of creditors, and the plaintiff could then claim under an express trust for himself. But if that were not so, and the intention was to promote the advantage of the children alone, it would seem to me to enure to the benefit of the creditors. The children advanced nothing. The executor or the agent, which is the same thing, bought avowedly, it may be taken, for the children or a part of them, and afterwards held the estate as a trust. It

Per RUFFIN, C. J. *arguendo*. The same objections apply to purchases made by an executor at execution sale of the assets, as to those made at his own.

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would be dangerous to say, that he who is charged with protecting in equal degree the interest of all claiming the estate beneficially or having claims upon it, should have the power of excluding some of the *cestuis que trust* and confering the benefit on a favored portion.

In this case, however, the estate paid for itself. The purchaser never was any thing out of pocket and claimed the negroes only as security, with a trust as to the surplus for those to whom the estate would go according to the will. The true construction of such a trust, unless the intent clearly and unequivocally appear, must be that it is not only for those to whom the will gives the property, but also as the will gives it, that is, subject to the claims of all persons against the legatees, as legatees. There was no intention in the administratrix or Mr. *Lavender* to defeat the claims of either creditors or the legatees, but on the contrary, as he expresses it to save the estate, which was no doubt mainly with a view to the children—but in doing that, the creditors are necessarily served incidentally. I therefore think the plaintiff is entitled to relief, and that it must be referred to the master to state the sum due to him, and to take an account of the estate of the testator in the hands of the defendants respectively, considering the slaves in question to be a part of the estate, which they are declared to be.

GASTON, Judge, concurred.

DANIEL, *dissentiente*.—I do not agree in the opinion expressed by a majority of the members of the court in this case, that an executor or administrator cannot purchase at a sale made by a sheriff, who has levied an execution on the goods and chattels of the testator or intestate. I know of no authority prohibiting them from purchasing at a sheriff's sale. I do not think the case comes within the reason of the rule which prohibits executors, administrators and trustees purchasing at their own sales. By the levy, the title to property is immediately vested in the sheriff, his sales are obliged to be public, after an advertisement. I do not see what chance there can be for the executor or adminis-

By DANIEL, Judge, *arguendo* — A levy vests the title to chattels in the sheriff. His sales are *prima facie* fair, and the case of *Blount* v.

trator, to commit frauds in case they are allowed to purchase. This court has decided that they may purchase at a sheriff's sale. *Blount* v. *Davis* (2 *Dev.* 19.) In the present case, *Lavender*, who procured the money was not the executor. He had acted only as the agent of the executrix. I should suppose that the purchase of the slaves by *Ross*, for the benefit of *Lavender*, was lawful, and that the title of the slaves vested in him.

PER CURIAM.—DIRECT A REFERENCE.

Davis (2 *Dev. R.* 9,) validates purchases of assets made by the executor at his sales. According to the case of *Blount* v. *Davis*, (2 *Dev. R.* 19.) executors may purchase the assets of their testator under a sheriff's sale.

WILLIAM MORRIS v. ELIZABETH FORD, *et al.*

A purchaser at execution sale, succeeds to all the rights of the defendant, and where the latter, before the test of the execution, had received a deed for land, which by the fraud of a third person, had before its registration been destroyed, and the legal estate conveyed by the bargainor to that person, the purchaser is entitled to a conveyance from him.

The cases of *Tolar* v. *Tolar*, (*ante* 1 *vol. p.* 456,) and *Price* v. *Sykes*, (1 *Hawks*, 87,) approved.

The plaintiff *William Morris* filed his bill against the defendants *Reuben H. Ford*, *John Ford*, *William Ford* and *Elizabeth Ford*, and therein charged, that he and one *James Morris*, in the year 1812, purchased from the defendant *Reuben*, the undivided moiety of a certain tract of land therein described, with the reservation of one acre thereof for *Elizabeth Ford*, paid the purchase money, and took from the said *Reuben* a bond with *Robert Catlett* surety thereto, conditioned to make a title so soon as a partition could be had between him, *Reuben* and *William Ford*, who was seized of the other moiety thereof that; the condition of the bond having been broken, *William* and *James Morris*, instituted an action thereon against both the obligors, and obtained a judgment for the sum of £87 0 8—that the plaintiff caused an execution to issue on said judgment, which was le-

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vied on the said *Reuben's* undivided moiety, in said land; that the sheriff sold the moiety so levied on, at public sale, that the plaintiff purchased the same at the price of forty dollars, and that the sheriff duly executed to him a deed therefor. The bill further charged that the tract of land aforesaid, had belonged to *Zebulon Ford*, who devised the same to *John Ford*—that of this will, the said *John*, and the defendant *Elizabeth*, were the executors—that the said *Reuben* and *William* were entitled to legacies under that will, that a dispute having arisen between the legatees and executors because of the non-payment of their legacies, and the wasting of the assets, the controversy had been left to arbitration; that the arbitrators awarded that the said tract should be conveyed to the said *Reuben* and *William*, in satisfaction of their demands with the exception of one acre to be reserved for the defendant *Elizabeth*, that in pursuance of said award, and shortly thereafter the defendant *Elizabeth* and *John* did convey the said tract with the reservation aforesaid, to the defendants *Reuben* and *William*, and that the said *Reuben* and *William* were seized thereof as tenants in common. The bill then charged that the defendant *Reuben* had caused the deed aforesaid from *Elizabeth* and *John* to be proved, but before the same was registered, and by combination with the other three defendants had caused the deed to be returned to the defendant *Elizabeth*, who destroyed the same, and that then the defendants *Elizabeth* and *John*, in order to defraud the plaintiff, executed a deed to the defendant *William* for the whole of said tract, who knew at the time, of the plaintiff's title to a moiety thereof, and who had taken possession of the whole of the said land. The bill prayed a discovery from the defendants, that *William* might be compelled to make a conveyance to the plaintiff of his moiety, and to account for his share of the rents and profits, and that a partition might be made of the lands.

The defendant *Elizabeth* alone answered. In her answer she admitted that *Zebulon Ford* devised the land to her son *John*, that *John* conveyed the same to her,

and that in pursuance of an award, she conveyed the same to *Reuben* and *William*. She alleged that according to the award she was to have the dwelling house and one acre of the land during her life—that there was to be no partition of the land between her sons *Reuben* and *William*, nor was either to sell his moiety during her life—that they were to work the land jointly, and during her life, pay her annually twenty-seven bushels of corn and eight bushels of wheat—that *Reuben* failed to perform his part of this award, furnished her with neither corn nor wheat, left the place, sold his part to *Robert Catlett*, and gave a bond to make title—that in consequence of this breach of the award on the part of *Reuben*, she required him to return the deed—that this was done accordingly, and the deed, with the consent of *Reuben* and *William*, was destroyed. She disclaimed all knowledge of any contract between the plaintiff and *Reuben*, admitted that the plaintiff did purchase under an execution a moiety of this land as the property of *Reuben*, but averred, that at the time of such purchase, he had full knowledge of the terms upon which *Reuben* had held the lands, and also of the destruction of the deed. She further alleged that on the 18th of May, 1814, after the purchase by the plaintiff at sheriff's sale, certain articles of agreement were executed by the plaintiff, herself and the defendant *John*, which she sets forth in *hæc verba*, and which are, that she agrees to sell off all her lands by the 25th of December then next ensuing, on the plaintiff's giving up his right to the claim of *Reuben Ford* —that if she made sale before that time, the plaintiff would give up his right to the claim of the defendant *Reuben*—that if she did not sell before the 10th of December, she should choose men to value the land or a part thereof and the plaintiff would make payment agreeably to their valuation, and that she should move off the land before the 20th December and not return to the same—and that either of the parties violating these articles should forfeit five hundred dollars. She then averred that in execution of this agreement, she sold the land to *William Ford* in fee simple, who now held the

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same, and that she moved off before the appointed day, but afterwards she moved back to it and resided there with *William* until he moved away and rented it to his brother *John*.

The other defendants have not answered, and a judgment *pro confesso* has been taken against them. The plaintiff replied generally to the answer of the defendant, *Elizabeth*, and the cause, as between them, now comes on to be heard on the pleadings and proofs.

The proofs filed were very voluminous, and those necessary to a correct view of the case will be found stated in the opinion given below.

Devereux, for the plaintiff.

No counsel appeared for any of the defendants.

GASTON, Judge.—After stating the pleadings as above, proceeded as follows:—

The plaintiff exhibits what he insists was the award, and proves its execution by *Philemon Morris*, one of the subscribing witnesses. It bears date 11th November, 1811, and in relation to the matters connected with this controversy, it awards that *Elizabeth Ford* shall make a deed to *Reuben* and *William Ford* for the land on which she lives, and that *Reuben* and *William* shall deliver to her twenty seven bushels of corn and eight bushels of wheat annually, and give her the house in which she lives and one acre of land adjoining, during her life.—The defendant exhibits another instrument executed many months afterwards, by three of the four abitrators, but dated the same day, which she alleges was made on purpose to supply an omission unintentionally left in the former instrument, and which she insists contains the true award. This differs from the other solely in this, that it contains a clause in these words, "owing to the "smallness of the tract of land, we do allow that no "division take place between *Reuben* and *William Ford*, "but each to work and to clear wherever they think pro- "per, and that none of them sell without the approba- "tion of the other." It is unnecessary to examine which of these contains the definitive award as it is proved by

the testimony of *Dulin*, and this proof is confirmed by the testimony of others, that the contract of *Reuben*, by which he sold his moiety to *William* and *James Morris*, was made in the presence and with the approbation of *William Ford*.

The plaintiff does not exhibit the bond which he charges to have been executed by *Reuben Ford* and *Robert Catlett*, conditioned for the making title to the plaintiff and *James Morris*, of the said *Reuben's* moiety in the land, although he gives parol proof of a sale and payment of the purchase money and of the execution of a bond for the title, but he exhibits a record, from which it appears that a judgment was obtained by the said plaintiff and *James Morris*, against the said *Reuben* and *Robert*, for the sum of £87 0 8, at the May term, 1813, of the Mecklenburg Superior Court, and that a *fieri facias* issued thereon, and exhibits also a sheriff's deed purporting to have been executed in consequence of a sale made upon that *fieri facias* on the 2d March, 1814, and purporting to convey to the plaintiff the undivided moiety aforesaid of the said *Reuben*. The plaintiff further exhibits the will of *Zebulon Ford*, devising the whole of this tract to his son *John*, and devising to his wife *Eliza* both the mansion house in which she lives, and her maintenance off the plantation during her life. It does not appear from the proofs whether this house and plantation were on the tract devised to *Reuben* or not. The plaintiff proves by *Philemon Morris*, that a few days after the award, *John Ford* and the defendant *Elizabeth* did execute a deed for the tract of land pursuantly to the award, which deed was witnessed by himself and *James Morris;* and also proves by *Daniel Fox*, *John Wilson* and *Sugar Dulin*, that there was such a deed. *Isaac Alexander*, the clerk of the court, testifies that this deed was proved in court, and before it was registered, the defendant *Elizabeth* applied to him for it —that he declined to deliver it to her—but that afterwards, on the application of one of her sons, with the permission of the court, he delivered the deed to the son, who made the application, and *William Wilson* tes-

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tified that *Reuben* got the deed from the clerk—that *William* obtained it from *Reuben*, stating to *Reuben* that he had held the deed long enough—that upon the delivery *Reuben* charged *William* to take care of it, and called upon *Wilson* to take notice of this delivery and of the charge accompanying it. The declarations of the defendant, *Elizabeth*, produces no testimony to show how she got possession of the deed, when and by whom it was delivered to her, for what cause, under what circumstances or by whose concurrence it was destroyed, or in any manner to explain the fact of the destruction. The exhibits filed shew that on the 28th January, 1814, *John Ford* executed a deed to her for the whole of the land, and that on the 27th of November, 1815, she executed a deed for the whole of it to the defendant, *William*.

In support of the allegation in the defendant's answer of the specific agreement therein set forth to have been made between herself, *John Ford* and the complainant, she offers testimony tending to shew that some agreement had been made and a bond executed by the parties to testify and secure the performance of this agreement—but no bond is produced, nor its loss accounted for, nor the terms of the agreement shewn. The witnesses who speak of the agreement also represent that one of its conditions was that she should remove from the land and not return to it, and they state that she removed for a few days only and then returned to the land. The defence, therefore, so far as it rests on this allegation, is wholly unsupported.

By the admission of the defendants then, *John*, *Reuben* and *William*, and on the proof against the defendant *Elizabeth*, it clearly appears, that a deed was executed by two of the defendants, *Elizabeth* and *John*, to the other two defendants *Reuben* and *William*, for the tract of land, whereof the plaintiff claims a moiety, which deed was effectual to convey the legal estate therein, in every respect except that it wanted the formula of registration—that the plaintiff purchased at execution sale, *Reuben's* moiety of the said tract—that after this deed was proved, but before its registration,

and with a view to defeat the claim of the plaintiff, under this purchase, or under the judgment, it was wrongfully destroyed by the defendant, *Elizabeth*, so that the same cannot now be obtained for registration—and that the evidence of *Reuben's* title to the moiety, conveyed by the sheriff to the complainant, being thus put out of the way, the other defendants *John*, *Elizabeth* and *William*, have contrived by a conveyance from *John* to *Elizabeth*, and then from *Elizabeth* to *William*, to vest the legal, or apparently legal title of the whole land in *William*.

We are of opinion that the plaintiff is entitled to be relieved against the fraudulent contrivances. Had *Reuben* been the individual injured by them, he would have been redressed on a bill against the other defendants. In the case of *Tolar* v. *Tolar*, (1 *Dev. Equity Reports*, 456.) it was decided that if a voluntary deed, fairly obtained, is destroyed by the donor, before registration, a Court of Equity will compel him to convey the same property to the donee, and certainly the same remedy would be granted against one who claims the property, subsequently to this destruction, and under a *mala fide* conveyance, from the donor.—The estate which *Reuben* held under the deed thus destroyed, was duly conveyed to the plaintiff, for it was to many purposes a legal interest, although the title was not legally completed. Such an interest it was holden in the case of *Prince* v. *Sykes & Iles*, (1 *Hawks*. 87,) was liable to seizure and sale, under an execution, before our act of 1812, which authorised the levying of executions upon equitable estates. The bargainee after the execution of the deed, and before the registration has not a mere equity in the land—he has an equity and an incomplete legal title. When the registration takes effect, he is then perfect owner from the time of the execution of the deed. If he dies before registration, his wife is entitled to dower, as of a legal estate. If a *precipe* be brought against the bargainee, and a recovery upon it, before enrolment, it is good, for he was tenant of the freehold. If the deed from *Elizabeth* and *John*

An unregistered deed vests in the bargainee an inchoate legal estate, which was liable to seizure under an execution, before the passage of the act subjecting equitable interest to execution sales.

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to *Reuben*, had been registered after the purchase, by the plaintiff, at the sheriff's sale, there could be no question but the plaintiff's title to the moiety would have been complete, and the defendants cannot be permitted to set up their criminal act in preventing this registration to the prejudice or destruction of this title.

The court does not consider it necessary to enquire whether under the award, directing a conveyance to *William* and *Reuben*, there was a lien on the land for the payment to the defendant, *Elizabeth*, of the annual supplies of grain which were awarded in her favour.—Certainly no express charge was created. The conveyance actually made was without condition, and the plaintiff is entitled to be placed in the same plight, as if the spoliation had not been committed. If the defendant *Elizabeth* could set up such a lien, she should have brought it forward, either by an original, or a cross bill, instead of alleging it as a pretext for her unjustifiable conduct.

The court will declare the plaintiff to be tenant in common with the defendant *William*, in the tract of land set forth in the bill, and decree that that partition be made thereof. It will also decree that the defendant *William* shall convey and release to the plaintiff all his interest and the estate in the portion which shall be allotted to the plaintiff in the partition: but that the plaintiff shall not during the life of the said *Elizabeth*, disturb her, or the defendant *William*, in the enjoyment of the mansion house, and one acre of land, to be laid off, adjoining thereto—that an account be taken of the rents and profits received from the land since the purchase of the plaintiff, at the sheriff's sale, and by whom the same were received, to a moiety whereof, the plaintiff is entitled, and that the plaintiff recover his costs from the defendants, to be taxed by the clerk of the court.

PER CURIAM.—DECREE ACCORDINGLY.

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JOHN SMITH *et al.* v. WILLIAM BARHAM, *et al.*

A residue which is given for life, with a remainder over, must be sold by the executor, and the interest paid to the legatee for life, and the principal to him in remainder, because this is the only mode of giving both sets of legatees, the enjoyment of those chattels which are perishable.

Slaves are, in this State, an exception to this rule, because they are not consumed in the use, and their natural decay is supplied by their issue, which goes to those in remainder.

Jones vs Simmons 7 Ired. Eq. 178

Taylor vs Bond Busb. Eq. 5

Williams vs Allen 2 Jo. & Eq. 395

Ritch vs Mowris 78 N.C. 377.

The plaintiffs were some of the legatees in remainder, of the residue bequeathed in the will of *John Barham*, deceased, and filed their bill against the executors, and the other residuary legatees, for an account and satisfaction. By an original and amended bill, it was charged that the testators died in September 1825, and directed his debts to be paid out of such parts of his estate as he did not specifically dispose of thereby, and "the residue "with all the lands he should die possessed of, he lent "to his wife *Mary* during her life," repeating, that by the term "residue," he meant that whatever should remain after the payment of debts, should go to the wife for life, and that after her death, the residue therein lent to his wife, (the land excepted,) should be divided amongst his children and grandchildren, in seven equal parts, of whom the plaintiffs were some, and the defendants the others. The defendants *Nicholas* and *William* were appointed the executors, and proved the will. The bills then further charged that the testator had about twenty slaves, which formed part of the residue, and also a large crop growing, and provisions on hand, a valuable stock of horses and cattle, and hogs, farming utensils and household furniture, all of which, except the slaves, it was the duty of the executors to have sold to raise a fund to pay the debts; but that instead of doing so, they either sold or suffered to be sold under an execution several of the slaves, one of which, *Dave*, the defendant *William* purchased, and left the other articles of inferior value, and most of them perishable in their nature, in the possession of the widow, who has consumed them, or they have been otherwise converted by her or

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by the executors. The bill also charged that the defendant *William* hired out some of the slaves, or made profit otherwise from them during the life of the widow, which should have been applied in discharge of the debts, instead of suffering any of the negroes to be sold for that purpose, and therefore that he ought to account for the value of the slaves sold, for the hire received by him, and also deliver up *Dave*, as a part of the residue. The bills also charged that the defendant *John Barham* owed the testator a large debt, which the executor failed to collect, although *William* purchased from *John*, his share of the negroes, and the other residue, and paid him for them with profits of the estate, then in his hands, and that the executors were chargeable with that debt.

The defendant *Nicholas* answered and admitted that he proved the will, but stated that he resided in Virginia and had never intermeddled with the estate or received any part of it.

The answer of the defendant *William* admitted the will as stated, and insisted that for the purpose of raising a fund to pay the debts, a discretion is given to the executors to sell any parts of the effects composing the residue, and do justice to all the parties. That accordingly he sold nearly all the stock, farming utensils, furniture and provisions, except only such things as were indispensably necessary for the support of the widow (a very aged woman and the mother of these parties) and that a sufficiency for that purpose, including the grain crop growing at the testator's death, was not left unsold, and that he did sell the crop of cotton of that year. That the widow died in September 1830, and that thereupon the negroes remaining unsold, were divided among the remainder-men, and the plaintiffs received their shares, and that this defendant then sold all the other articles which had been left unconsumed by the widow, and applied the proceeds to the discharge of a balance of the testator's debts then unpaid. He admitted that some of the negroes were sold under execution, and averred that it was unavoidable, as suits were pending against the testator, and he was unable to raise

cash to discharge the judgments; and that he purchased *Dave*, at a full price, and borrowed the money to pay for him, but he submited to have the purchase declared void, at the election of the plaintiffs. He further admitted that he hired out some of the negroes, but said the widow was entitled to the hire, and that he was ready to account with her representative. With respect to the debt of *John Barham*, the answer stated that the defendant found among the papers of the testator some evidences that he had paid money for his son *John*, several years before his death, and that he, the defendant, being unable to get any information upon the subject, or whether his testator had been satisfied, sued out attachments against *John*, (who resided out of the State,) and levied them on a slave *Abel*, specifically bequeathed by the testator to him, and also on his share of the residue upon which judgments were had, and a sale made, and that he, the defendant *William*, became the purchaser. That one reason for attaching this interest was, that other creditors of *John* would have done so, and if the debt to the testator was really due, as it appeared to be, it would then be lost: That he made the purchase for the benefit of the estate, and was willing that it should be so considered, if it was to stand at all, or to take it himself, as the plaintiffs might elect. But that he has recently discovered that the debts were probably not due, and that the whole proceeding was founded in a mistake, upon the apprehension of which, at the time of the purchase, it was understood that if it should so turn out, the purchase should enure to the benefit of his absent brother *John*. That *John* has since declared that nothing was due, claimed the property, and instituted proceedings to reverse the judgments, and that the persons interested in the estate, except one of the plaintiffs, *Smith*, had agreed to surrender the claim.—He submited to hold this part of the estate, for the benefit of either of the parties in whom the right might be deemed to be.

The answer of *John Barham* set forth the particulars of that part of the case relative to the claim against

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him, more at large, and alleged that de did not owe his father any thing, and that the proceedings were irregular and null, and claimed his share of the property. He also claimed that all the hire and profits of the negroes, and other property which had accrued during the life of the mother, and also the proceeds of the crop growing at the testator's death, belonged to the tenant for life, and was to be accounted for by the defendant *William*, to her representative.

A reference was made to the master, and he reported against the executors a balance of $1154 29, exclusive of interest. To produce this result the master charged the defendants with the hire of certain of the slaves during the life of the widow, and also with the sales of the cotton, and corn crops, growing at the death of the testator, and further with the value of hogs, sheep and wheat, and one cask of brandy, not sold, but consumed by the widow. The master made no report upon the subject of *John Barham's* debt, and his claim to the property sold for it, and gave as a reason that there were proceedings at law between him and the executors, to vacate the judgments, and to ascertain the debt, if any. The master also charged the defendant *William*, with the price of *Dave*, as upon a sale to him.

To the report both parties excepted, but the exceptions of the defendant raised the only questions of importance.

Devereux, for the plaintiff.

The Attorney General, & W. H. Haywood, for the executors.

RUFFIN, Chief-Justice.—After stating the pleadings and report as above, proceeded:

Between the heir and the executor, the growing crop goes to the latter; but between the executor and the devisee, the rule is different.

The crops growing on the land, at the time of the testator's death, go to the executor as against the heir, but as between the executor and the devisee, the latter is entitled them. The devisee takes the land by the intention of the testator, with every thing on it, for as the devise carries the land against the heir, so it does the crop against the executor. The rule is so strong, that if the devise

be for life with remainder over, and the first taker die before severance of the crop growing at the death of the testator, it goes over with the land to the remainder-man, in preference to the personal representative of the first taker.

Here the testator died early in September 1825. He then left in the grainery, a small quantity of corn, and wheat—not more than sufficient to support the stock and negroes, until the executors could, at the next court, prove the will and get authority to sell. It is in evidence that it was not sufficient; for a considerable portion of the growing crop was used for that purpose.—Now although it may be the duty of the executor upon a will like this, to sell all the perishable property, and invest the proceeds for the security of the fund, for the remainder-man, paying the interest, as the profits, to the legatee for life, yet some time must be allowed to make it, and in the meanwhile the stock must be supported and kept fit for sale, and the slaves fed. The executor ought not to sell until probate, to obtain which he is obliged to wait for a court. It is the interest of all concerned, that the support should be drawn from the property itself, until the sale is made in seasonable time. Here it was in December 1825, about one month after the probate of the will. The exceptions of the defendant to so much of the report as charges the executors with thirty bushels of wheat on hand, is, on this ground allowed. And the exceptions to so much of the report as charges them with the corn and cotton growing at the testator's death, is also allowed. In the account a particular quantity of corn, 80 barrels, is charged as a distinct item, at $360, and also of fodder, 10 stacks, at $25, which is seen at once. But the cotton does not explicitly appear upon the report. There is a charge for one bale as an item in the account, being as the master states, a part of the crop not sold, and put down at the price of $30. But the principal part of this charge is in the general item of "amount of sales" $1967 93, which upon a reference to the account of the sales obtained from the County Court, (which was the

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evidence on which the master acted,) is found to include 9263 lbs. of cotton, disposed of at the general sale by auction, at $305 68. It appears upon the proofs that this cotton, fodder and corn was on the land when the testator died, and was gathered by the executor and widow. To the latter they belonged, and to her the executor is accountable, and not to the residuary legatees in remainder.

A legatee for life is bound to keep down the interest of a debt charged upon his legacy, and he may be compelled to contribute to its payment. But he is not bound to surrender the whole profits for the purpose of extinguishing it.

The same is true also as to the charges of the hire of the slaves, which belong to the widow. When there is a devise of lands, or a specific bequest of a chattel for life, with remainder over, and the subject is charged with debts not equal to the whole value, the tenant for life may be required to keep down the interest out of the profits, or the parties are required to raise the principal by contributions in proportion to the value of their respective interests. But certainly in no case can the remainderman require the whole profits to be applied in extinguishment of the charge, for the sake of saving the subject, for that would defeat the life estate altogether.—But in a residuary bequest to one for life, and then over, the whole is subject to the immediate payment of debts, and the executor may and ought to sell enough for that purpose, in the first instance. For it is only what remains, after payment of debts, that is given either for life, or over. So much of the capital is to be sunk at once. Here it has been done by the sale of a part of the consumable articles, and a part of the slaves; and the plaintiffs say that was wrong, and so the master finds, because there were sufficient profits of the unsold slaves to answer that end. That position cannot be maintained. These profits are the use given to the tenant for life. The exception to these charges in the account must therefore be allowed.

The master has also charged the executor with 28 shoats, 35 fat hogs, 6 sheep, 80 gallons of brandy, and some casks and hogsheads, of the value altogether of $261. He has also charged them with the value of some household furniture, not sold either at the sales after the death of the testator, or after that of the widow,

to the value of $15. The executors except to these charges upon the ground that these articles were necessary to the support of the widow and the family, and in order to keep up the plantation. The argument on the other side is that these articles should all have been sold, and if necessary for that purpose, the proceeds applied to the payment of the debts, or if not thus needed, invested and the interest only paid to the widow for life, and therefore that the executors are chargeable with their value.

We believe the common understanding of testators in the country is with the defendants; for they can hardly be supposed to give to their widows lands and negroes for life, and to intend to strip the plantation.—But we believe likewise that the law is clearly with the plaintiffs on this point.

The legatee for life of a specific chattel has a right to the possession of it; and the assent of the executor to his legacy vests the title of him in remainder.

Where there is a gift of a specific chattel for life, and then over, the executor may assent to the legacy and discharge himself from liability to the remainder-man, by delivery to the tenant for life, for the assent to that legacy, is an assent to the one in remainder. It was formerly held, indeed, that the executor would be bound to the remainder-men, unless he took security from the tenant for life, that the thing should be forth-coming at his death. But unless there be collusion, it is now held otherwise, and the tenant for life is only bound to give a receipt, or sign an inventory as it is called, unless there be reason to believe that the article will be destroyed or sent away—in which case the executor may refuse to deliver it without security, or the remainder-man may after delivery file his bill for security. (*Foley v. Burnell*, 1 *Bro. Ch. ca.* 279.) In such cases, the remainder-man must be content to receive the article as it ought to be left by the first taker, after using it with ordinary care and prudence. When, however, there is such a specific gift of what we commonly call, and what the master here calls, "perishable articles," or of what are embraced under the description in the books, of "articles *quæ ipso usu consumuntur*," it is difficult to say what is meant. I rather think testators seldom do

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mean to give such things for life only, and that those words are annexed by mistake to that gift, by inadvertently inserting it in the clause giving other things of a different kind, and which are meant to be for life only. But if the testator really intends such a gift to be for life, we can hardly imagine what rights of enjoyment he meant for the objects of his bounty respectively. For to give wine, corn, sheep or cattle for life, is to give the whole, if the legatee is to have any use of it, since the property, nay, the consumption, is inseparable from the use: unless the testator has this further meaning, that the tenant for life may consume and sell, as he would himself if living, and that whatever is left, both of the original stock and the increase, shall be taken as the estate of the testator, and go to the remainder-man. I rather suppose that this is the meaning, for such dispositions are generally found in the provisions for wives, to whom children are to succeed, and the testator supposes that the mother would wish them to take all whether it be his or her estate. This notion may have grown up from the rule of our law respecting the increase of slaves given for life, all the articles being given together in the same clause. But to the admission of such a construction there is the insuperable objection that it is against the positive and ancient rule of the common law, that the increase is the use and profit, and therefore belongs to the tenant for life in whose time it accrued; to which, slaves constitute the only admitted exception. We would not feel authorised, upon bare conjecture as to the testator's intention, to carry it farther. Then what are the respective interests of the tenant for life, and remainder-men inconsumable chattels specifically bequeathed? From the decisions it is far from clear. We do not know of any in our own courts upon the point. In England it is apparently unsettled. In *Foster* v. *Tournay*, (3 *Ves.* 311) *Lord Alvanley* said that some learned judges had thought the articles must be sold, and the persons entitled to the limited use have only the interest; which he thought very rigid. Yet in *Randall* v. *Russell*, (3 *Meriv.* 190) Sir *William Grant*,

When a specific chattel which is consumed in the use, is given for life, what interests vests in the remainder-man?

taking notice of that observation, says that his conception is that a gift for life, if specific, is a gift of the property in things, "*quæ ipso usu consumuntur*," and that it comes within the reason of the old law that there cannot be a limitation over of a chattel after a life estate.—He admits it to be otherwise, when such articles are included in a residuary bequest, with others of a different nature, in which case the whole are to be sold by the executor, and the interest received by the tenant for life. That is the case now before the court, and therefore further speculation upon the effect of a specific bequest is unnecessary.

It seems clear that when a residue is given, as such, it is to be sold by the executor. The several things are not given, the testator supposing them not worth giving, as *corpora*, not knowing how much, or which of them it may be absolutely necessary to sell for payment of debts and pecuniary legacies. The gift is then of the nett balance of the proceeds after the debts are paid, which implies a sale. And if this were not the case, when there is an immediate gift of the residue after the debts are paid, it must be, when there is a limited use given in the surplus to one for life, and then to another; for then there is nothing to shew that as to the consumable articles the testator meant to give the particular legatee that use which consists in consumption, and as they are complicated in the same clause, with the others of a different nature, the whole must go together, and as a part must be sold, the whole must, and the first taker have the profit only. For upon the intention it is taken that the benefit is to be divided between the legatees in the whole subject, which cannot otherwise be, for if the tenant for life does not use the perishable articles, he gets no benefit, and if he does use them, the legatee over gets none. Such parts of the exceptions as relate to these articles must therefore be overruled. The executor is properly charged with the value of them in this suit, and as the widow had the benefit of them, he will be entitled in the settlement he will make with her representative, to the value now answered for by him, as

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a credit against the charges against him for her cotton sold by him, for which he has by this decision credit in this suit.

To the rule thus laid down, slaves are an acknowled expection, founded on the known expectations of testators, and the general understanding of the country, and the profession. Indeed the reason of the rule itself constitutes them an exception. They are not wasted by use, and if they are, that waste is supplied by their issue, which it has long been held, goes with the remainder. With respect to them, service and not increase is the use of the tenant for life. When, therefore, they are included in a residue with other things, they are to be treated as they generally are when left by an intestate, not sold, as other parts of the estate, but divided amongst those entitled, unless a sale be necessary for debts or distribution.

The defendant *William* having submitted to have his purchase of *Dave* declared void at the election of the plaintiff, it would be of course. But the master has charged the price of him, (which is proved to be a full one,) in the account, and it has been paid in discharge of debts, and the plaintiffs have taken no exception upon that point, which is an election, and binds them.

The result of these views is that a balance is found due to the executors as far as the accounts have been stated, and the bill would be dismissed but that the plaintiffs may wish a further enquiry upon the subject of *John Barham's* debt. For that purpose the cause will be retained, but if no motion for further directions be made by the plaintiffs, on or before the calling of the case at next term, the bill will be dismissed afterwards, when moved for by the defendants.

PER CURIAM.—ORDER ACCORDINGLY.

ABIGAIL M. RUDISELL v. ROBERT WATSON.

The words "to her and her heirs' proper use," annexed to a legacy to a married daughter, do not make it a legacy to her separate use, being probably an ineffectual attempt to secure it to her children, and not intended to defeat the right of her husband, and the fact that the testator uses different words in legacies to his sons, is not sufficient to rebut this presumption, and repel the claims of the husband.

Zenas Alexander by his will declared as follows:—

"I will and bequeath to my beloved wife, *Margaret* "*Alexander*, my dwelling house where I now live, with all "the out houses and barns, during her life or widowhood, "together with an absolute right to two beds and furni- "ture, &c. which latter, I will at her whole disposal.

"I will and bequeath to my daughter, *Abigail M.* "*Rudisell*, one black woman slave, *Peggy*, and one "black girl called *Retty*, together with her two beds "and furniture, and all the household and kitchen fur- "ture that I give her after she married: and also the "one half of all my land that lies on the east side of the "road that leads from Charlotte to Beattie's ford, all to "be for her and her heirs' proper use, and the issue of "said *Peggy* and *Retty* in the same way, the land to be "equal in quality and quantity.

"I will and bequeath to my son *Amyzy W. Alexander*, "all my tract of land, containing &c.

"I will and bequeath to my daughter *Hannah G.* "*Neil*, one black woman, named *Sally*, and one named "*Betsey*, together with her two beds and furniture with "all the household and kitchen furniture, that I gave "her after she married, and also the one half of all my "land that lies on the east side of the road that leads "from Charlotte to Beattie's ford, all to be for her and "her heirs' proper use, and the issue of said *Sally* and "*Betsey* in the same way together with their hires.

"I also will to my wife, during her life time or "widowhood, all my household and kitchen furniture, "with an absolute gift of the best bureau, and small "falling leaf table, to be at her disposal.

"I will to my daughter *Abigail Rudisell*, the two lots

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"in Charlotte, whereon *William Rudisell* has built a "tan yard."

The will contained devises and bequests to his sons, which were expressed in general terms, viz: "I will and bequeath," &c. without any words from which an intention could be inferred either to qualify or enlarge the estate. The plaintiff by her next friend filed this bill seeking to secure to her separate use one of the slaves mentioned in the second clause above quoted.—The defendant claimed under a purchase from her husband, and the only question was whether the testator by his will had secured the legacy to the plaintiff to her sole and separate use.

Devereux, for the plaintiff.

Badger, for the defendant.

RUFFIN, Chief-Justice.--Upon looking through this will I am by no means certain that I can gather from it the intention of the testator upon the point involved in this suit; or that the construction I am obliged, upon authority to put upon his words, be not against his intention. I believe, however, that the claim of the wife cannot be sustained upon adjudged cases, or original principles.

At law a gift of chattels to the wife is a gift to the husband, and under a devise, the right of the latter to be tenant by the courtesy, attaches in the same manner as if the estate of the former had accrued by deed or descent. As a general principle, the rule of equity is the same. Because the reason for investing the husband with the property is as strong in equity as at law, namely, that he can manage it better than the wife, dispenses with the charges of a trustee, and ought to have it, as he is legally chargeable with the maintenance of the wife and family. But in equity certainly there may be a separate interest given to the wife, which cannot be at law. The question always is, whether one was intended by the testator. As I just remarked, I understand that upon this, as upon most other questions upon the rights to propety, equity follows the law, and therefore, that while a separate estate can by the law of this

court be given to the wife, yet it is not favored. The court does not gather that intention by a measuring cost, but only sustains it when it is unequivocal and expressed in unambiguous terms. The words "separate use" are appropriate to this purpose. Any others may have the same effect standing by themselves, or in context with others, which express the whole legal idea belonging to the first—that is, not barely an interest in the wife, but the entire interest in her, to the exclusion of the husband. Thus in *exparte Ray*, (1 *Mad. Rep.* 199) "sole" was said to be tantamount to "separate," but even in that case there were those other words "such estate and effects to be and *remain* to the *sole* use, benefit and *disposition*" of the feme. So in *Hartley* v. *Hurle* (5 *Ves.* 540) *Lee* v. *Prieaux* (3 *Bro. ch.* 383) a trust to pay the profits "into the proper hands of the wife," or to pay an annuity to the feme covert, the trustee not being bound to see to the application of the money, but to be discharged by her receipt, were deemed sufficient.—In the last case, because as no other receipt would discharge the trustee but that of the feme, she must be entitled to receive it without, or against the will of the husband. In the former, because evidence under her hand must be sufficient evidence of payment into her hand and therefore as the receipt of the husband is not necessary, his interest is excluded. Here there is no trust created, but a bequest of personalty, and a devise of land to the daughter, all in one clause, to which are added these words, "to be for her and her heirs' proper use." I have found no case in which these or similar words have been considered tantamount to separate use. They are the appropriate words in deeds operating under the statute of uses, which are almost the only species of conveyance used in this State, and an unskilful person, (such as the draftsman of this will certainly was,) might very naturally transfer them into a will, without intending to give to them any peculiar force in this instrument, as demonstrative of any meaning of the testator, but that the devisee or legatee should have the absolute property. It is true, such words are not necessary in a will; and it

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is likewise true that we have no right to reject any words, but must give effect to every one used. But the question is what effect? Can we say, the testator meant by these expressions, to give a separate estate to the wife, instead of the absolute property, merely upon the ground that they were not necessary to the latter purpose? The words are not appropriated terms to express either intent, since a will does not raise a *use* and since "proper" has not the same meaning as "separate." I admit however, that no technical terms are necessary to express either intent. But yet it is to be considered whether the intention to create a separate use can be collected here. It is argued that it is, because the words are unnecessary and unmeaning, unless they have that effect, and therefore a different inference is to made from them, than if found in a deed. This argument, if followed out, would carry us to this extent, that every personal bequest to a married woman was to her separate use—for as at law a gift to the wife is a gift to the husband, why in a will give it to the former at all, instead of the latter, unless it was intended that the former, and not the latter, shall have the legacy? There is a possibility, and even a probability, that such was the intention. But a possible or probable intention will not sustain the wife's claim. It must be plain and more than a conjectural exclusion of the husband. Hence although the words might bear the construction contended for, yet if they will bear the other also; if there be an equal probability that they meant to express something else, namely, the interest devised, and not the uses to arise on that intent, the claim of the wife is repelled. It is said, however, that these words "proper use" have received this meaning in a will; and *Hartley* v. *Hurle* is relied on as authority in point. I have already remarked on that case. It was a trust "to pay the profits into the proper hands" of the daughter a feme covert. It did not turn on the word "proper," but upon the "*payment into the hands* of the legatee; and was supported as a separate interest in the wife, notwithstanding the omission of the usual words "notwithstanding her co-

verture," because her receipt was necessarily a sufficient discharge to the trustee, without her husband joining.—So it was held in *Adamson* v. *Armitage*, (19 *Ves.* 419,) that a trust to pay income for "her own sole use and benefit" made a separate estate, but this was on the word "sole." A case was cited there and in *Lamb* v. *Milnes*, (5 *Ves.* 517,) in which it was said to have been decided that the words "for her own use and benefit," would have been sufficient, without "sole." But upon examination that case was found to be the other way, as is stated in a note to *Lee* v. *Prieaux*. And there are two subsequent cases upon these very words, "own use and benefit"—*Willis* v. *Sayres* (4 *Mad.* 409) and *Roberts* v. *Spicer*, (5 *Mad.* 491.) It is true that in the former case there was a previous express legacy in trust for the separate use of the wife; and in the latter, property was given by another clause, to trustees for the wife, "not subject to the debts of the husband," and the court said these express separate provisions made it clear that the others were not of that character. But it was likewise held that upon the force of the particular words "her use" or "her own use" in the clauses then under consideration, no *separate* use could be implied; for "her use" expressed nothing that would not arise without them, and "her *own* use" meant no more. I think no person can find a difference between "her *own*," and "her *proper* use." Upon authority, therefore, this disposition even in England would not, as I conceive, be held to secure the property separately to the wife; much less ought it to be here, since such provisions are uncommon among us, and it may therefore be asserted, that when intended, the purpose will be very explicitly expressed.

Upon the words of this clause alone, therefore, my opinion is decisively against the bill.

But upon this clause in connection with the rest of the will, I admit the question is more doubtful. The testator gives to this daughter in the beginning of his will two female slaves, some articles of furniture, (which he says he gave her upon her marriage,) and a tract of land, "all to be for her, and her heirs' proper use and

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the issue of the slaves in the same way." He had another daughter, Mrs. *Neil*, to whom in another clause, he gives similar property exactly in the same words. All his other children are sons, to whom he makes dispositions of personalty and realty without expressing what estates he gives them, or using the word "heirs." By another clause, there is a devise to the plaintiff of two lots in Charlotte, on which her husband has built a tan-yard, without any other words; and for the purpose of paying his debts, he directs certain land and the residue of his estate to be sold, and gives the surplus, after payment of debts equally to be divided amongst all his children and his wife. By the first clause in the will the testator gives to his wife certain lands for life, and also an absolute property in some personal things, and adds "which latter I will at her disposal," and in the eleventh clause, gives to his wife during life, all his household and kitchen furniture, with an absolute property in the best bureau and table, adding "to be at her disposal."

The doubt upon this will taken altogether, arises on the difference in the terms in which the lots in Charlotte, and the property now claimed, are given to the same person. That is increased when we find the provision for the only remaining daughter stated in the same words, while nothing like it is said in the devises to the sons. This raises a strong probability that some difference was meant either in the extent or nature of the interest of the sons and daughters, and as to the property given to this daughter in the two clauses by which she is provided for. The question is whether that difference consists in raising a separate use. I am not sure that was not the meaning of the testator. I incline to think it was. But I am not sure it was. I conjecture so; because if he did not mean an absolute gift in the ordinary way, that is the next and most natural thing we should expect him to mean. But it will not do to guess. The husband cannot be excluded without plain recorded words, or a necessary implication. Here 'proper use' is applied in the will as well 'to her heirs' as to her-

self; which rebuts the idea that it was intended to convey the sense of sole or separate use of the wife, in respect either of her then or any subsequent husband.—The thought which dictated the sentence may I apprehend, have been rather the interest of the children of the daughters. To the sons and the daughters he intended the whole property, and expecting the sons to be able to provide for their families, he does not fetter the gifts to them by any provision of his own. It is otherwise as to his daughters, and therefore he adds, that the gifts to them shall be not only for *their* proper use, but also for the proper use of "*their heirs*" or children: which intention is the more strongly to be implied from the superaddition of the issue of the said slaves in the same way. What way? Not to the wife, as against the husband; for no such provision could be necessary for that purpose, since if the wife had the separate estate in the mothers, she would have it also in the increase. But as the words "her heir's proper use" were in the mind of the the testator, appropriate only to the land, and showed only that he intended the children to take an interest in that, he feared that they might not have the increase of the slaves. He says therefore expressly, that such shall be the case. I acknowledge that this is not clear, and it is true that if such was the intention of the testator, it cannot upon these words be effectual. For the children cannot take under this clause, but the whole vests in the mother. But we are seeking the intention of the testator, as to the creation of a separate estate, and therefore if the words, though not effectual for the purpose, were used to a different end, they cannot raise the former intention. "The issue of the slaves to go in the same way," seems to me to make it at least probable that the whole clause upon which this claim is founded, was introduced to restrain alienation by the husband and wife, or by the latter alone, so that the property should go to the issue; the testator deeming it sufficient that the issue should take by succession, which would fall on them if the alienation was forbidden. This too is fortified by these provisions

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for the wife, the only other female mentioned in the will. Where the testator gives to her absolutely in terms, he further grants in each case his permission that it may be alienated by saying "to be at her disposal."

Upon the whole therefore, although I think it more than probable that the testator meant to exclude the husband, I am constrained to decide in favor of his right, because the conclusion is not manifest. The words in the particular clause, do not themselves in their natural sense, import it sufficiently. In their context they shew that the testator may have meant something else besides a simple disposition in absolute property to his daughters, but are not sufficiently explicit to have the effect on the one hand of destroying the right of the husband, more than on the other, of admitting the issue as purchasers. If the testator had either or both of those intentions, he has expressed himself too defectively to enable the court to control the operation of the general terms of disposition, and the bill must be dismissed with costs.

Per Curiam.—Bill Dismissed.

Elizabeth Redmond v. Bethuel Coffin, *Ex'r. of* Thomas Wright, *et al.*

Where to a bill by the next of kin against the executors and legatees, the latter relied upon a former decree, pronounced in a cause between the same plaintiff and the executors, commenced after the legal estate of the legatees was complete, but the executors did not plead it, nor in any way rely upon it, the decree was held not to be a bar.

The plaintiff in her bill averred that she was the sole next of kin of the testator of the defendant—that he died in the year 1816, possessed of a number of slaves, and by his will devised as follows: "I give and bequeath "them (the slaves) unto the Society of Friends of New

"Monthly Meeting or their agents and their successors. "I also give and bequeath all the personal property of "my estate to the above named black people, to be sold "and equally divided amongst them." The plaintiff averred that the bequest of the slaves to the New Garden Society was a bequest in trust that they might be emancipated, as the religious opinions of the Society forbade its members, or the Society as a body, to hold slaves—that the bequest of the residue to the slaves was void, because of the incapacity of the legatees to take, and that a trust resulted to her as the next of kin, both of the slaves and of the residue. She then averred that one of the slaves named *Jim* had been sent out of the State to foreign parts, for the purpose of being emancipated. She also averred that she had appointed one *Willie Wright* her attorney in fact, to settle with the defendants; but that he had greatly abused her confidence, and that she had revoked his power. The prayer was for an account of the prices of the slaves, and of the residue, and payment of the value of *Jim*.

By an amendment *Eliazur Hunt*, *Timothy Manney*, *Josiah Unthank* and *George Swain*, agents of the New Garden Meeting, were made defendants, and the plaintiff alleged that they had received the said slaves and surplus of the executors, and had hired out the former, and she prayed the same relief against them which in her original bill she had prayed against the executors.

The executors by their answer insisted that the New Garden Meeting as a body politic could take and hold slaves, and averred that believing the bequest to be valid, they had in August, 1816, delivered the slaves, and paid over the residue to the agents of that Meeting. They denied notice of the plaintiffs' claim until the year 1818, after they had delivered the slaves. They stated that in December, 1817, *Wright* presented to them a duly authenticated power from the plaintiff, authorising him or his substitute, to settle and compound with them for the plaintiffs' share in the estate of their testator—that *Wright* appointed one *Draughn* his substitute, and

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that they came "to a full and fair settlement and com-"promise for all the interest of the plaintiff in the estate "of their testator, for the recovery of which the said "*Willie Wright* had filed a bill of complaint in the court "of equity for the county of Guilford"—and that *Wright* received the consideration stipulated to be paid by them upon the compromise. And they averred positively that this settlement and payment was made without notice of the revocation of his power.

Two papers executed by *Wright*, dated the 12th and 14th days of December, 1818, were filed. The first was a release, in which it was recited that "*Willie* "*Wright* of &c. attorney and agent in fact for *Betsey* "*Redmond*, of Fayette county, in the State of Kentucky, "by virtue of her power, investing me with all right, &c. "have remised, &c."—this was signed and sealed by *Wright*, without the addition in any way of the name of the plaintiff. The other was without a seal, was signed by *Wright* alone, without reference to his principal, and acknowledged the receipt of 450 dollars as a consideration of the compromise. The last was relied on as a bar and was filed as an exhibit to the answer. The first was proved by the deposition of an attesting witness.

The answer of the agents of the New Garden Meeting set forth at large the religious belief of the Society, and insisted that as a Society, they could take and hold slaves. They admitted, however, that slaves held by the Society were not worked for its profit—but that the money realised from their labor was deemed by the Society a fund to be held in trust for the slaves, and to be used for their spiritual and temporal advancement.

They charged that the plaintiff "heretofore preferred in "this court her bill of complaint against the executors "of *Thomas Wright* for the same causes of complaint "and relief sought in this bill, and that after full con-"sideration of the claims of the respective parties, and "for the purpose of finally disposing of and adjusting "all matters in litigation and equitable consideration in-"volved therein, the said controversy and suit was "compromised by the parties at and for the sum of 450

"dollars, which was paid by the said executors to the "said plaintiff, by her attorney duly authorised and em- "powered, to wit: one *Willie Wright*, who as agent and "attorney managed and conducted the said suit; and "for which said sum paid as aforesaid, the said W. W. at- "torney as aforesaid, released and conveyed to the said "executors all the title, interest and claim of the said "plaintiff in and to the estate of the said testator, and that "in pursuance of the said compromise made as aforesaid, "a decree of the court of equity for the county of Guilford "was duly made at &c. in the following words to wit: The "plaintiff, by her attorney in fact, W. W. having sold, and "assigned and released all her right and interest in the "slaves and other property of *Thomas Wright*, dec'd. to "the defendants in consideration of four hundred & fifty "dollars paid to him. Bill dismissed, each party pay- "ing their own costs," and they prayed the full bene- fit of this decree, as if it had been specially pleaded.

The release and conveyance mentioned in the answer was that above stated, filed by the executors. These defendants exhibited a copy of the former bill and decree, which fully supported their answer and plea. Replica- tions were taken to these answers, and the proofs filed were very voluminous. A condensation of them is un- necessary, as they are stated in the several opinions de- livered in the progress of the cause. It was argued at great length at June term, 1831, by *Winston* for the plaintiff, and by *Gaston*, *Nash* and *Mendenhall* for the defendants, when the following opinion was delivered. The cause was not then reported, as the papers were sent to the court below, before it could be stated.

A bequest of slaves for the purpose of e- mancipation, is void, and a trust results to the next of kin.

RUFFIN, Judge.—The general question upon the valid- ity of the charity created by this will, was not much ar- gued in this case. I presume the counsel considered, as the court does, that it is not open to discussion. Qualified emancipation of the kind set up by the answer, and proved so distinctly by the member of the society of Friends who has been examined to it, stands upon the same ground as a bequest directly for that purpose.—

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However praiseworthy the motive for accepting such a trust, or however benevolent the will of the donor may be, it cannot be supported in a court of justice. A stern necessity arising out of the safety of the commonwealth forbids it. *Haywood* v. *Craven*, (2 *Law Repos.* 557) and *Huckaby* v. *Jones*, (2 *Hawks* 120.) are leading cases; the one a direct declaration of the purpose of emancipation; and the other of one collected by the court from the terms of the will. They were followed by the *Trustees of Contentnea Society* v. *Dickinson*, (1 *Dev.* 189.) and *Stephens* v. *Ely*, (*ante* 1 *vol.* 493.) which leave no part of the ground unoccupied. The former was on a conveyance to the Friends for the same purpose designated in this bequest; only this is stronger because here is a bequest to the slaves, which shows, on the will, that the testator meant emancipation. That is not an odious, but it is a dangerous and unlawful species of mortmain; and a trust results to the next of kin, where there is no residuary clause.

The cases of *Craven* v. *Haywood*, (2 *Law Repository* 557,) *Huckaby* v. *Jones* (2 *Hawks.* 120.) *Catentnea Society* v. *Dickinson*, (1 *Dev. Rep.* 189) *Stephens* v *Ely*, (*ante* 1 *vol. p.* 491,) approved.

Several bars to an account are set up here. The first is, that of a release, which is relied upon in the answers of the executors and also of the trustees. That annexed to the answer, and said to be a copy, bearing date the 14th of December, 1818, is not a release from any body, not being under seal. And it might perhaps be proper to exclude any other, because that and that alone is relied on in the answer. But the reading of the original proved by *Hubbard*, and bearing date the 12th of December, 1818, was not objected to, and will therefore be considered by the court.

An instrument in its terms a release, but not under seal, cannot be pleaded as a bar.

Neither of them can avail the defendants because neither is executed in the name of the principal. It is not material in what form the deed be signed, whether *A. B.* by *D. C.* or *D. C.* for *A. B.* provided it appear in the deed, and by the execution that it is the deed of the principal. But that must appear; and the cases cited, put that beyond doubt. To them may be added, *Combe's* case, (9 *Rep.* 75.) *Frontis* v. *Small*, (*Ld. Raym.* 1418,) and *White* v. *Cuyler*, (6 *T. R.* 176.)

An attorney must act in the name of his principal, and a deed executed by him, in his own name, and as his proper act, does not bind the principal.

As a positive bar then, these papers are nothing.

They do not mention any sum of money paid. But the answers state, that money was paid, namely, the sum of four hundred and fifty dollars; but *Hubbard*, the subscribing witness examined by the defendants, says that the sum agreed on was $ 300, of which only part was paid, a note being given for the residue. A question has been made on this, whether the payment to *Wright* was good since his power was revoked, and the parties had notice of the revocation. The court would not declare that fact, were it in the least doubtful; but leave it to arise on the master's report, upon his allowing or disallowing the sum paid to *Wright*, as a payment to the plaintiff. But it is positively sworn by *Scott*, that he gave notice of the new power to *Swain*, who made the agreement for the executors with *Wright*, and through whom the money was paid. He is supported by the testimony of *Draughn*, who says that when he came to see *Wright* next day at Greensboro', he heard of the revocation, and told *Wright*; and that he had before seen the defendant *Coffin*, and been told by him that he had seen *John C. Redmond*, the agent appointed by the second power, and had a conversation with him respecting the suit; though he did not say that he told him of the second power. From this it seems certain, that the power to the son was at the place, in the possession of *Scott*; and no conceivable reason can be assigned why he or the son should conceal it, while the compromise was going on, and disclose it immediately afterwards. The court must therefore take it, that the revocation was known to *Swain*, who was the agent in the business, and consequently to the executors; and declare that the payment was made by the executors, or on their behalf, in their own wrong.

A partial payment by a trustee, to his *cestui que trust*, cannot, under any circumstances, operate as a discharge of the residue.

If this were not so it certainly could not be set up, but as a satisfaction *pro tanto*. A payment of a less sum is not a satisfaction for a greater then due, even at law. Much less does a payment by a trustee of a part of the fund belonging to a *cestui que trust*, extinguish the right to the residue. Here besides the slaves, the plaintiff was entitled to more money than was received. But it is unnecessary to pursue this point; because even the sum

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advanced was not a payment to the plaintiff, for want of authority in *Wright* then to receive it.

It is however contended, that a decree pronounced in a former cause, brought by the plaintiff against *Coffin* and others, the executors of *Thomas Wright's* will, is a bar to this suit. It is not pleaded by either of the defendants. Nor is it relied on in the answer of the executors. But it is brought forward in the answer of the trustees of the Quaker society to the bill as amended, so as to make them parties. And the transcript of the first suit has been read in evidence. From that it appears that a bill was filed in February, 1818, by this same plaintiff for an account of *Thomas Wright's* personal estate against his executors, who are also part of the defendants in this suit. There were no other defendants but the executors. No answer was put in; and after the compromise before spoken, viz. at April term, 1819, the entry in question appears.

It has been objected by the plaintiff, that this does not bar as a decree; because it does not profess to be the act of the court, or to be founded on the merits, but that of *Willie Wright* himself, after the revocation of his power, in execution of his agreement. Perhaps if strictly construed it might be held so, and therefore only obligatory as an agreement. But I believe the decree is clearly removed out of the case, upon other and more general principles. When a former decree is pleaded and relied on as an absolute bar, *proprio vigore*, it must be a decree determining the very point in a suit between the same parties. This is the case at law, and hence a judgment against A is not evidence in a suit against A. and another. In equity there may be this difference: that as the liability of the several defendants in this court may be several, the introduction of a new party in a second suit, shall not prevent a former decree from protecting one of the defendants, who is called in question a second time, for the same matter. For as to that matter, the parties are the same. But a decree in favor of one cannot protect another, who was not a party, unless he be a privy. And indeed a stran-

ger thus introduced cannot use the decree at all, as such, because it cannot be used against him. I will not say that the executors might not have relied on this as a former decree; but the other defendants cannot set it up, because they are not bound by it, being neither party nor privy. Indeed in this very case, they have objected to the reading of a deposition taken in the former suit, upon this ground, and the objection was sustained. The reason is, if they had been defendants before, the decree might have been different, because other evidence might have been offered. (1 *Phil. Ev.* 250, 252, where the cases are collected.) I am now speaking of the decree operating as being an adjudication, and not as founded on a compromise; in which last case it may be used by any body as evidence of the fact of satisfaction. The privity between the executors and the society did not then exist. It never did extend to any thing but the slaves, for the residue is not given to the society, but to the slaves, and the bequest was merely void. Then as to the slaves, they were delivered over on the 16th of August, 1816, to the trustees of the Quakers, as alleged in both the answers in this suit. There is a privity between trustees and *cestui que trusts* as long as that relation continues; and a legatee is bound by, and can avail himself of a judgment or decree for or against the executor, while the trust is open, and the funds in the hands of the executor. But after the trust estate is conveyed to the *cestui que trust*, or the legacy assented to, and the property delivered to the legatee, there is no further privity. The legal estate is in the legatee himself. A suit then against the executor founded on his acts or breach of trust, does not affect the legatee, who claims above it, and by a legal title prior to the institution of the suit. When the privity is destroyed, the consequence necessarily follows, namely, that as a stranger, he can neither be benefited nor injured by a decree in a suit against the executors. For the estoppel of *res judicata*, like all others, must be mutual.—Here the trustees of the society did not come to the estate since the former decree, nor *pendente lite*; but before

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the former suit was instituted. And as to the money arising from the perishable estate, that was paid over to them without any pretence of right, and therefore, though paid after the first suit, it must be considered as remaining, for the purposes of this suit, in the executor's hands.

The next consideration is, whether the decree protects the executors themselves—that is conclusively. They have not relied on it. Can another set it up for them? Or when not relied on as a positive bar in the pleadings, but offered in evidence, is it not open to an investigation of the merits of the demands determined in it. At law, a former judgment is conclusive: but to make it so it must be pleaded (if the party have an opportunity,) as an estoppel. And if it be not pleaded, the matter is at large; because the party may think that he can do better than he did before. (*Vaught* v. *Winch* 2 *Barn. & Ald.* 662.) Here, the executors may have been conscious that the decree was obtained by collusion with *Willie Wright*, the removed agent.(as it was certainly entered after notice of the revocation of his power,) and not willing to litigate it, and to have chosen to rest their case upon its merits. It is not for another to prevent that. Again: the plaintiff might have dismissed that bill, upon the discovery that the legal title of the slaves had passed by the assent to the legacy, because she did not choose to take a personal decree against the executors who might be insolvent, or because she wished to recover the specific chattels. She may follow the property; and a bill for that purpose is not barred by a previous bill against another person through whose hands it has passed, unless the privity then existed, and unless, at any rate, it appear that in the first suit, the right to the chattels be the very point decided. Both because there was no privity between these two sets of defendants at the time of the filing of the former bill: and because new matter, that is, a right to specific relief against another person, not a party before, upon a state of facts not brought forward in the first suit, that decree does not bar this suit. But if it would have that effect, it would extend only to the persons in whose favor that decree was pronounced,

if relied on by them. They have waived the bar, and have elected to have a decision upon the merits, as well they may, if they wish to assume any appearance of fairness as between the other parties. They ought to desire that the right should prevail between them; and therefore, very properly, left the case open to a decision of it. As it would be enough for them, that they delivered the legacy *bona fide*, they ought not to attempt to conclude the true owner, if she be such, from recovering back that which they delivered over by mistake.

As the case stands then upon the pleadings, the former decree (if it be one) does not prevent this suit going on. The former defendants submit that it shall. The new defendants cannot forbid them. And the new defendants cannot avail themselves of the proceedings, as such, in a former suit, to which they were not parties nor privies.

Upon a bill by the next of kin if his character does not conclusively appear a reference as to that fact, will be directed.

It is next objected, that the plaintiff has not shown herself next of kin of the testator. It is common to direct an inquiry to ascertain who are next of kin; and the bill would not be absolutely dismissed on the hearing upon that ground, where the relation is not denied, though not admitted in the answer. But here there is *prima facie* evidence in favor of the plaintiff. The testator had no issue; nor is any parent, or other brother or sister shown. The plaintiff alleges, that she is sole sister, and resides in Kentucky. Her residence is proved, and there is no evidence that another of her name lived there. It is proved by a witness that the testator said he had a sister living in Kentucky, by the name of the plaintiff, and that he corresponded with her husband; and spoke of no other brother or sister. And further, in both the letters of attorney, she recites her relationship, and upon the faith of that, and other information acquired by the defendants, probably from *Willie Wright*, (who was a relative,) they treat with *Wright* as her agent for the whole estate. After this, the defendants cannot say, she is not to be presumed of kin, at all events, until upon enquiry, if the defendants ask for it, the contrary shall appear.

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Another question of some difficulty was touched on at the bar, which the court will not decide without further argument. It is whether the testator's widow is entitled. Clearly she was not against the charity, unless she dissented. Thence the argument arises, that she cannot say she was not to have a part only in favor of the trustees; but that under our act of Assembly the legacy is a satisfaction of her whole claim on the estate, because the testator must be supposed to make the bequest in reference to her rights. On the other hand, this being a legacy which fails for its illegality, it may be said that intention is out of the case altogether; for if the intention prevailed, both the widow and next of kin would be equally included. It becomes a case, where the law disposes of the fund, because in the case that has happened, no intention is to be collected either way; and when the law distributes, there is but one rule, which is the statute. Possibly, there may be a distinction between an undisposed residue, and that of a legacy failing as this; and possibly too, the act of 1784 may bar her right in both, as she did not dissent. The court inclines to let in the widow; but it is too general a question to be decided, having the widow's representative before the court, and without full argument. It will be left, therefore, to be considered of by the plaintiff's counsel.

A motion was made on that side to remit the cause for amendment in another particular; and if they deem it expedient, on this point, to make the widow's representative a party, the case may go back for that purpose, as we do not wish to conclude the question unless the case is put into such a shape as will allow a full hearing to the claims of the widow. But if the plaintiff chooses to bring on a final hearing here, relying upon her exclusive right, she may do so, at the risk of having her bill dismissed for want of all proper parties, in case the court should think the widow entitled.

Per Curiam.—Declare the bequest of the slaves to the New Garden Meeting to be illegal and void, and that

of the residue to the slaves to be also void, for want of capacity in the slaves to take, and that a trust of the slaves and residue results for the next of kin. Declare further that the letter of attorney made by the plaintiff to *Willie Wright* was revoked on the 1st day of October, 1818, and that the defendants had notice thereof before making the compromise with *Wright*, and that therefore the plaintiff is not bound by the payment alleged to be made to him.

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Declare also, that the decree relied on in the answer of the agents, does not bar this suit against the the executors, because they have not pleaded the same nor relied upon it in their answers as a bar—and that it does not bar this suit against the other defendants, because they were not parties to the suit in which it was pronounced, and because the executors were not at the time the said decree was made, nor thereafter, trustees for the other defendants, nor otherwise privy to them.

The minutes then directed an account, and gave the plaintiff an election to have the cause remanded to the court below, with liberty to make the wife of the testator a party.

Upon this order the plaintiff elected to have the cause sent back to Guilford, where he made the administrator of the widow a party. It appeared that she died a few days after the testator, without having entered her dissent to the will, by which she took both land and slaves.

The master, during the time the cause pended in the court below, made his report, in which he charged the defendants jointly, with the nett residue of the estate of the testator, 416 93 dollars, and interest thereon: with the value of four slaves, which had been carried to distant States, and interest thereon—together with the annual value of all the other slaves and interest thereon—amounting in the whole to 3,621 74 dollars.

The cause was removed to this court again, at June term last, when the defendants excepted to the report:

1st. Because the master had disallowed the payment to *Wright*.

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2d. Because he had charged them with the value of slaves which had been removed, and interest thereon.

3d. Because he had charged them with interest upon the annual value of the slaves.

In support of their first exception, the defendants filed a petition to rehear so much of the order made at June term, 1831, which declared that the payment to *Wright* had been made after notice to the defendants of the revocation of his power.

Nash, & Mendenhall for the defendants.

Winston for the plaintiff.

RUFFIN, Chief-Justice.—The master having made a report under the reference ordered at June term, 1831, to which the defendants having excepted, the cause has been again brought on upon the report and exceptions, and on the motion of the plaintiff for further directions.

The report finds the balance of the proceeds to the personal estate, exclusive of the slaves, to be $416 93, on which interest is computed from April, 1821, that being the time when the executors stated and returned their account current. The master finds that this sum is not now in the hands of the executors, but was paid to the other defendants, the trustees of the society of Friends, or by their order, and was in fact applied in paying the sum agreed to be given upon the compromise made with *Willie Wright*.

To the whole of this charge, both the executors and the trustees except; the latter, because the money was never in their hands; and the former because it was paid with the privity of the trustees, and on their behalf, in good faith on the part of the executors, under the belief that it belonged to the society as owners of the slaves, and that *Wright* was the agent of the plaintiff.

The report also finds that in 1816, the executors delivered all the slaves to the trustees, and that in 1819, one of the slaves was sent out of the State to parts unknown, or was permitted by the defendant to go, so that the plaintiff cannot now get the possession of him, and that pending this suit, viz. in 1825, three others of them

were in like manner sent or permitted to go away. The master charges the defendants with the value of those slaves, as of the time they were sent away, and with interest from that time. He also charges them with reasonable hires of all the slaves while in their possession, including those sent away up to the time they went, and interest on those hires as they become annually due.

To this part of the report the executors and trustees also respectively except, the former because they properly assented to the legacy to the society, and delivered the slaves to the trustees when their duty ceased, and they were no longer liable for either the slaves or their profits, since if a trust resulted to the next of kin, it arose out of the legal estate in the agents of the society: And the latter, because they have personally derived no profits from the slaves, but allowed them to enjoy the profits of their own labor, and to leave the State under the honest belief that they belonged to the society, and that such was the intention both of the society and the testator. And as to the interest both sets of defendants except upon the common ground that it is not chargeable on rents and hires.

To the proper consideration of the exceptions, it is necessary to advert to the pleadings, and to the transactions previous to this suit. *Thomas Wright* died in April, 1816, and by his will bequeathed his slaves to the society of Friends of New Garden monthly meeting, or their agents and successors, and gave the residue of his personal property to the slaves themselves. This has been heretofore declared to be a trust for emancipation, and as that was against the policy of the law, that it was void, and resulted to the next of kin. The executors however, delivered the slaves to the agents, in August, 1816. On the 16th of February, 1818, the present plaintiff as sole next of kin of the testator, filed her bill against the executors for an account of the personal estate, and alleging that the trust of the slaves resulted to her. The plaintiff is a widow residing in Kentucky, and appointed *Willie Wright*, residing in Guilford, her agent to prosecute her suit in Guilford, and receive the

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estate that might be coming to her. *Wright* was an incapable and distressed man, and as the event proved, faithless as an agent. The executors put in no answer to that bill at Spring term, 1818, but got leave to answer at the next term. At the next term they still delayed to answer: Yet *Wright* did not set down the bill as confessed, but enlarged the time to another term. Before that arrived he was put in prison for debt, at whose instance, does not clearly appear. But there is much reato believe that these defendants were connected with it, for no communication for a settlement seems to have been had until he was imprisoned. On the 12th of December, 1818, the executors engaged with one *Draughn*, acting on behalf of *Wright*, for a compromise, and then advanced $60 towards it, for the purpose of releasing him from jail, which was to be valid, in case *Wright* should accede to it, and the residue should then be paid. The next day *Wright*, then in jail, assented to the arrangement, and it was concluded by the execution of two papers by him, one dated the 12th of December, 1818, purporting to be a general release to the executors, on the part of the plaintiff, of all demands for any part of the estate of the testator; and the other dated December, 14th, 1818, in consideration of $450 then paid, to discharge the suit, and to sell and assign to the executors, all the interest and claim of the plaintiff in and to the slaves and all other parts of the estate. This agreement was made by the executors personally, and by the advice and with the assistance of the defendant, *George Swain*, who acted on behalf of the society and their trustees, who state in their answer, that they advanced part of the money. The sum paid to *Wright* does not precisely appear. *Draughn* says it was $410, including the previous $60, while *Hubbard*, a witness for the defendants, and a subscribing witness to one of the instruments, says it was $800 or thereabouts, for part of which a note was given. At spring term, 1819, the suit was dismissed under the agreement, by rule of court. This transaction has already been declared not to be a bar to the plaintiff, upon the ground that *Swain* and the executors then

knew that the plaintiff had revoked the authority to *Wright*.

In July, 1824, this suit was brought, having the same objects with the former, and making the agents of the society defendants, and charging that the compromise with *Wright* was unduly obtained, after the plaintiff had revoked his authority, and the other parties had knowledge of the fact. Both the executors and the agents by their answer, insist upon the compromise and release as a bar, and also upon the title of the society to the slaves under them, and under the bequests of the will, upon the ground that the society controlled them, and does hold them as property, though they do not apply the profits to the use of the individual members, or that of the society as a religious association, but as a charity for those slaves or others. The executors deny that *Jim* has been sent away by their privity, and say, although they are friends and members of the same meeting, that they had no control over the slaves, but the agents only. And the agents insisting upon a general property, say of course they had a right to send him or allow him to go away.

Although executors who *bona fide* pay a legacy to a charity of doubtful validity, are protected, yet when slaves were bequeathed to a Quaker society, upon a trust for emancipation, and the executors confederating with the society to defeat the claim of the next of kin, delivered the slaves to the society, and otherwise acted *mala fide*, they, in default of payment by the society, were held responsible for their value and hire, and also, for interest thereon.

As a general rule, it must be admitted that executors are bound at their peril, to pay money and deliver the property to the proper persons entitled to it, as next of kin, or legatees. It may be admitted as an exception, that executors in trust, for a charity, under a will of doubtful construction, or where the validity of the charity as a question of law, is doubtful, who act honestly, though erroneously, will be protected in the application of the funds, until demand from the person entitled. Upon this principle, perhaps the executors might be excused for delivering the slaves in August, 1816, to the other defendants, though the court cannot recognize the purpose of emancipation, there being no evidence of meritorious services, as being in this State, a moral and charitable object in a general sense, much less a charity in a legal sense, and it is hard to suppose any citizen of North-Carolina, and especially of the Society of Friends, to be so little informed of the law upon this subject, as not to be certain of its illegality at

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least. But the case does not require an opin'on upon that point, nor even upon the effect of emancipation of the slaves, promised or permitted by the agents, before notice of the plaintiff's rights, either upon their own responsibility, or that of the executors. For it does not appear that any of them have been emancipated at any time, and it does appear that the parties had full notice of those rights, before any of the slaves were sent away. Three of them indeed, have been put beyond the the plaintiff's reach pending this suit, in which the defendants assert a right to withhold them from her, as being legally and beneficially their property. This would be a conversion at law. The fourth was sent off in 1819, in the interval between the termination of the first suit, and the bringing of this. Can that be regarded as *bona fide*, and arising from an honest mistake? I must here remark that the case of *Haywood* v. *Craven*, was decided in this court in July 1816, in which the nature of such trusts was determined. Every body deemed the question one of great importance, and perhaps no decision was ever sooner and more generally known, either as to the point of it, or its principles. In possession of the knowledge of it, how stands the conduct of the defendants. They may be considered as acting upon a motive of praiseworthy benevolence in the abstract, in the endeavor to free their enslaved fellow creatures, but in reference to the law of their country, and the duty of obedience to it, and in reference to the rights of property of the plaintiff, they cannot pretend good faith. They acted in bad faith in respect of those obligations. They endeavored to fortify their asserted rights of property, by the release and assignment by the plaintiff of her right of property. They attempted to give that character to instruments obtained from one to whom she had given authority, and from whom she had withdrawn it, with their knowledge, in the hope she could not prove such knowledge on their part, and therefore that she would be bound notwithstanding the revocation. And if *Wright* had still authority, the compromise was made upon such terms, and under such

circumstances, that it could not stand in this court, but would be set aside as unduly obtained upon inadequate consideration, and by taking advantage of, if not producing the distresses of the agent. The first suit had pended nearly a year without an answer, and without any steps towards a settlement. We then find the agent in jail, and immediately the compromise is proposed, and the plaintiff's money paid for his discharge; and the whole sum paid is less than the cash balance in the executors hands, to which the plaintiff was entitled; in consideration of which, she is made to release all claims to the residue of the estate, and to convey the slaves specifically. Upon a bill filed to get rid of such a deed, upon the single point of fraud and imposition, the plaintiff must have been relieved, which is an answer to all that can be said about the good faith of the parties. If the executors had come forward as persons standing indifferent between the claimants, according to their duty, and said we have so much money, which we are ready to pay you, but as to the slaves we cannot deliver them to you, because we have, as we thought we ought, already delivered them to the agents of the society of Friends, and if there is a trust for you, apply to them, or for relief against them, it would have made different case. But the executors and agents made a common cause, and this unfair compromise is effected, and an assignment of the slaves is actually made to the executors themselves, no doubt for the protection of the agents. Each of the parties is, in such a case, liable to the true owner for all subsequent conversions or misapplications of the property, though they may not be liable in equal degree, but the one after the other. Here all the parties are before the court, and the plaintiff seeks the specific property. As far as it can be had, she is entitled to it; but for any parts of it that have been eloigned, she is entitled to compensation from the last holder and actual wrong-doer; and if satisfaction cannot be obtained from him, then she has a right to look to all the others by whose more remote agency the injury to her has arisen. That compensation consists in the value of the slaves withheld from her, and interest on it.

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As to the sum paid to *Wright*, it being wrongfully paid by the executors, it must be considered as between them and the plaintiff, to be still in their hands; but as between them and the other defendants, the agents, it was paid with the privity and by the request of the latter, and for the confirmation of their pretended title to the negroes, and therefore was a payment to their use, and the agents must be liable first for it. It is true that one of the defendants, Mr. *Swain*, was not appointed one of the agents of the Meeting until the 26th December, 1818, but he is equally liable with the others for the whole, for he was the individual who made the compromise and payment, acting on behalf of the meeting of which he was a member, and the other agents and he, as agent, subsequently ratified the whole, and all four of the slaves were sent away after he had charge of them.

As to the hires and the interest on them: Hire is the natural profit of slaves, and if not made, ought to have been made, and the owner is entitled to receive it from those who withold the slaves themselves. It is no answer to say that the negroes worked for themselves. That was as much against law and public economy, as against the individual rights of the plaintiff. It certainly is not the general rule to charge interest on the annual profits, nor would it be allowed here, if the defendants had rendered a fair account, or allowed the case to be decided simply on the original rights of the parties. But the extreme injustice done to the plaintiff in the beginning, in denying her right, in taking advantage of the incapacity, the faithlessness and necessities of her agent, to extort a release and a conveyance from him, upon payment only of a very small part of what was due to the plaintiff, and after they knew that she had appointed another attorney, and the attempt to set those deeds up as a bar in this suit, and in the meanwhile to send off some other of the slaves beyond the jurisdiction of the court, all together constitute so gross a case of bad faith, and wilful resistance to the cause of justice, and the claims of property, as acknowledged and guaranteed by the laws, as subjects the defendants to account upon the most rigorous principles, and renders them justly chargeable with

the highest hire, and interest on it. For which reasons, all the exceptions are overruled, and the report confirmed, and the plaintiff must be declared entitled to all the slaves reported to be yet in this State, and to recover from all the defendants the sums of money reported to be due for the residue and for the value of the four slaves sent away, and the hires of all the others, and interest upon those several sums; for which however, the defendants, the agents of the society, are liable to her in the first place, and therefore execution will issue therefor immediately against them, and if upon return thereof it should appear that satisfaction of the whole, or any part thereof cannot be had from them, that then the plaintiff shall have execution against the other defendants for the deficiency then remaining.

When this cause was before the court, upon the hearing in 1831, a doubt was entertained upon the right of the testator's widow, to a share in this property as not being effectually disposed. The point has been since much considered, and finally decided against the right in *Craven* v. *Craven*, at the present term. So that the bill, so far as it seeks to recover any thing as belonging to the widow by her administrator, must be dismissed.

The case of *Craven* v *Craven* (*ante page* 344) approved and followed.

PER CURIAM.—BILL DISMISSED.

ESTHER ARMSWORTHY v. AQUILLA CHESHIRE.

An answer which is responsive to the bill, and contains a clear, precise and positive denial of it, must be disproved by more evidence than the testimony of one witness, to entitle the plaintiff to a decree.

This bill was filed at February term, 1817, of the Court of Equity, for the county of Rowan, by *John Armsworthy* and *Esther* his wife, against *Aquilla Cheshire, Letha Call, Julia Cheshire* and *Turner Jarvis*, and having been dismissed as to all the defendants, but the one first named, the controversy between the plaintiffs and the defendant has been narrowed down to the matter

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in dispute between them. In relation to this matter, the plaintiffs set forth in their bill, that *Burch Cheshire* died intestate, in the month of February, 1816, and that administration on his estate was, at the August term, 1816, of the County Court, duly granted to the plaintiff, *Esther*; that the deceased at the time of his death was upwards of eighty years of age, and for many years before his death, from age and infirmity, his mental faculties had become greatly impaired, so as to render him incapable of attending to the management of his own affairs; that the defendant *Aquilla* lived in the same house with the intestate, and had acquired great influence over him, that the said defendant some short time before the intestate's death did contrive to deceive the intestate into the execution of a deed for several of his slaves, by representing to the intestate that the deed presented for his signature, was a conveyance for some of his stock and household furniture only; and that upon the death of the intestate, the defendant, under the fraudulent deed thus obtained, took the said negroes into his possession, and yet holds the same. Upon these allegations the plaintiff prayed that the deed might be set aside as fraudulent, and that the defendant might be compelled to surrender the negroes, and to account for their hire, and for general relief.—The defendant answered at April term, 1817, and in his answer set forth that he was the grandson of the intestate, had from infancy lived in his family, and for many years before his death managed his concerns; that the deed in question, together with other deeds for other objects of the intestate's bounty, was executed in the summer of 1815; that at the time of their execution the intestate was of sound and disposing mind, and perfectly knew their contents and their operation; that they not only were read to him, but were often read by himself; that they had been written at the intestate's request, by one *Braxton Bryant*, a schoolmaster of the neighborhood; that after they had been written, the execution of them was postponed by the intestate for two weeks or more, in order to have them attested by one *Arthur Smith* & *Tho-*

mas *Hainline*, but that not being able to get the said *Smith*, *David Sheets*, and said *Hainline* were requested to become the witnesses; that the deeds were executed in the night, before early bed time, that the defendant *Bryant*, *Hainlin* and *Sheets*, were returning from a muster, and did not get to the house of the intestate until after candle light; that soon after their arrival the intestate and *Bryant* were alone in a room where as he was informed and believed that the deeds were again examined, and the intestate having determined to execute them at that time, they were executed and witnessed by the said *Sheets* and *Hainline*; and that the whole transaction was without circumvention or deceit of any kind. In answer to an interrogatory respecting the connexion between him and the subscribing witnesses, he added that *Sheets* was the brother of his wife, and that *Hainline* was the brother of his wife's former husband.

At October Term 1817, the death of *John Armsworthy*, the husband of the plaintiff, *Esther*, was suggested, and the suit ordered to be carried on in her name.

This answer having been replied to, by the defendant *Esther*, the parties proceeded to take their proofs. The most important deposition on the part of the plaintiff was that of *Braxton Bryant*. This witness' deposition was taken on the 17th September 1817.— In it he stated, that he had been applied to by the deceased to write his will, and was furnished the proper memoranda wherewith to prepare it. That after this will was written, the intestate consulted him on the propriety of giving away a portion of his property by deeds of gift, because his son-in-law, one of the plaintiffs, threatened to sue him on account of some moneys which were alleged to belong to the estate of a deceased son of the intestate. That the witness was requested to write four deeds of gift, one to the defendant *Aquilla*, and one to each of the other original defendants, which deeds were to comprehend respectively the same property as was bequeathed to them in the will; that the defendant who had also requested him to write the said deeds, prevailed on the witness to prepare also a fifth deed, which should contain four negroes in addition to the property

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intended for him by his grandfather, and promised to reward the witness's services in this respect, by a gift of one hundred dollars to the witness's daughter—that accordingly, besides the four which he was instructed to prepare by the intestate, he fabricated a fifth, conforming to this request of the defendant—that the old man had previously read the first four deeds, and that on the night when the execution of them was about to take place, he, the witness, slipped the fifth and false one in the place of that which the intestate supposed he was to execute in favor of the defendant, and thus this deed was fraudulently executed, and, after being executed was attested by the subscribing witnesses. He further declared, that the four negroes, included in this spurious deed, were, by the old man's instructions, not to be inserted in any of the deeds, but to be permitted to go to his lawful children. That this imposition was practised at the instance of the defendant, and that he believed at the time it was done, he, the witness, slipped into the defendant's hands the paper which was to have been, but which was not executed.

The subscribing witnesses were examined on the part of the defendant. *David Sheets* only stated that at the request of the defendant he went with *Bryan*, *Hainline* and others to the house of the deceased, and was requested to witness some instruments of writing which he understood to be deeds for portions of the old man's property to the defendant and others, and that these deeds were either executed, or the execution of them acknowledged in his presence—that he supposed from the manner in which the transaction was done that it had been well considered of, and the old man aware of what was doing, and that the witnesses were requested by him not to say any thing respecting the transaction during his life, as he was unwilling to cause an altercation in his family.

The other witness, *Hainline*, was more circumstantial. He stated that he was twice requested by the defendant to attend at the house of the intestate, to witness a deed of gift—that he failed to attend on the first invi-

tation, but went upon the second—that he reached the house of the old gentleman in the night, about two hours after dark—that some time after his arrival, at the request of the defendant, the intestate was left alone with *Baxton Bryant*—that when he and *Sheets* went again into the room, (at whose call he did not state,) the old man signed in his presence, and delivered to the defendant *Aquilla*, the several instruments of writing which were attested by himself and *Sheets*—that when the old man delivered the papers he used these words: "I deliver these for the purposes therein expressed," and all appeared to be done deliberately and of his free will—that it was one or two hours after the witness arrived at the house before the business was done—that when it was done, *Bryant* asked the old man if he wished to have the affair kept secret, and he replied that he did.

A vast number of other depositions were filed, of which it is not necessary to take a particular notice.—From these examinations it appeared that the intestate was more than eighty years of age when he died—that he had been a man of ordinary education, able and accustomed to read and write—that at the time of the transaction in question, his sense of hearing was much impaired—that he was yet able to read with the aid of glasses—that his understanding was weakened by age and infirmities; but he was yet competent for the rational disposition of his property. He had three legitimate children living, who were his next of kin, the plaintiff *Esther*, *Elizabeth*, married to *Richard Williams*, and *Nelly*, the wife of *Benjamin B. Walker*. The defendant *Aquilla* was the illegitimate son, and *Lethe Call* the illegitimate daughter of *Sarah* a deceased child. *Julia Cheshire* was the illegitimate child of *Latty*, another deceased daughter of the intestate, and *Fanny Jarvis* was the child of *Ruth*, a daughter of *Elizabeth Williams*, born out of wedlock. It did not appear whether any of these descendants, legitimate or illegitimate, lived in his family, except the defendant *Aquilla*, who had the active superintendence of his affairs, and was greatly trusted by him.

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Gaston, Judge.—After stating the pleadings and proofs as above, proceeded:

Many of the depositions give the opinion of the witnesses as to the general character of *Baxton Bryant*, for truth on oath, and are in this respect directly at points with each other. Some of the witnesses relate conversations with him apparently confidential, and soon after the transaction, concurring with the account which he afterwards gave on his examination, and others depose to conversations with the same witness in which his statements were at variance with that to which he afterwards testified. According to all of the witnesses, he appears to have been a man of talents and education, who once sustained a fair character, who afterwards became intemperate and indulged in excessive drinking, and finally fell a victim to that vice. At what step he stood in this descending scale when the transaction took place, or when his deposition was taken, it is not easy from the testimony of the witnesses to determine.

The original deed to the defendant is not upon file, but a copy is produced, accompanied with an affidavit from the defendant that the original had been placed in the hands of his counsel, Mr. *Henderson*, and since the death of that gentleman, he has not been able to procure it.—From this copy it appears to have been executed on 4th August, 1815, and to have been exhibited for probate at May Term, 1816, the term succeeding that at which administration on the estate of the intestate was granted to the plaintiff. The will mentioned as having been prepared for him by the witness *Bryant* is not produced, nor any account given of it. If in existence, it would have been a very important paper to conform or counteract *Bryant's* statements—and if in existence, it must be presumed, from the control which the defendant had over the affairs of the intestate, to be in his possession.

After all the testimony had been taken, and these exhibits filed, the cause was set down for hearing and came on to be heard before the Judge of the Court of Equity for the county of Rowan, at the April term 1825, of said Court, when his honor was pleased to direct an issue in

the following words to be submitted to a Jury: "Was the deed of gift mentioned in the plaintiff's bill from *Burch Cheshire* to *Aquilla Cheshire* fairly or fraudulently obtained?" And a jury being charged with the trial of said issue, returned a verdict that the said deed was fraudulently obtained. A rule for a new trial was granted, which was held over until October term, 1826, when it was made absolute. The cause was continued until October term, 1828, when by consent of parties, it was removed to the court of the adjoining county of Davidson. In that court, at the April term, 1830, the same issue was again submitted to a jury, who also returned a verdict that the deed of gift mentioned in the plaintiff's bill, from *Burch Cheshire* to *Aquilla Cheshire* was not fairly, but fraudulently obtained. Thereupon the court ordered that the defendant should enter into a bond with good surety, payable to the plaintiff, in the sum of $500, for securing the payment of the hire of the negroes in contest; and that on his failing to do so, the sheriff should take the said negroes into his custody, and hire them out until the next term, taking bond and surety for the forthcoming of the negroes. It does not appear that any motion was made for a new trial of the issue, or for any order of the court to set aside the verdict; but at the next term, the same issue was again submitted to a jury, and they also found that the said deed of gift mentioned in the plaintiff's bill, from *Burch Cheshire* to *Aquilla Cheshire* was not fairly, but fraudulently obtained. Upon the trial of this issue it appears from the transcript, that the Judge instructed the jury that they were not at liberty to find the same against the defendant, upon the testimony of a single witness, unsupported by circumstances furnished by the testimony of other witnesses—that the defendant, after the last mentioned verdict was rendered, moved to have it set aside, and to have a new trial awarded, because the said verdict was contrary to the weight of evidence—that this motion was overruled—that the defendant thereupon insisted that the plaintiff's bill ought to be dismissed because the testimony of the only witness relied upon to

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prove the fraud, was not supported by circumstances furnished by the testimony of any other witness. That this objection was overruled and thereupon the presiding Judge did declare and decree that the deed made by *Burch Cheshire* to the defendant *Aquilla*, bearing date the 4th of August, 1815, for the negro slaves *Sam*, *Dennis*, *Rachael* and *Rachael* the younger, was obtained by fraud, and that the said defendant do surrender the same to the clerk of this court, to be cancelled—that the defendant do deliver up to the plaintiff *Dennis* and *Rachael* the only survivors of these slaves, and *Baal*, the offspring of the other *Rachael*, on the plaintiff entering into bond and surety to have them and their issue forthcoming to answer the final decree of the court, and to pay their hires to the defendant in case the final decision of the court should be in his favor—that the clerk and master should ascertain and report the value of the hire of the slaves since they have been in the defendant's possession—whether any, and if any, which have died—whether they have had increase, and if so, the names and ages of such increase—whether the defendant is entitled to any credits, and if so, the amount thereof; and that the cause be held over for further proceedings; and it was further ordered that the master take an account of the value of the other property contained in the said fraudulent deed. Several other interlocutory orders, which it is not necessary particularly to recite, were subsequently passed, respecting the safe custody of the property. A petition was then filed to re-hear the order made at the April term, 1825, directing an issue of fact to be submitted to the jury; also to re-hear the decision of the Judge on the motion for a new trial of the issue at the October term, 1830; and the declaration and decree of his Honor at the said term, pronouncing the deed to be fraudulent, as herein before stated. This petition was granted, and a report having been also made by the clerk, and exceptions taken thereunto, the cause has been removed into this court for a final adjudication.

On behalf of the defendant, it has been insisted on

the re-hearing, that the interlocutory order for submitting an issue to a jury was contrary to the established rules of a Court of Equity. It is urged that according to these rules, wherever the defendant's answer positively denies the allegations in the plaintiff's bill, and these allegations are supported only by the testimony of a single witness, the court will neither make a decree against the defendant, nor send the case to be tried at law—that in this case there was nothing more than the positive assertion of one witness, and a positive denial by the defendant: and that the witness whose assertion is the sole foundation of the plaintiff's cause, shews himself by his own statement, wholly destitute of that integrity which should give him a claim to credit. Of the first part of this proposition we entertain no doubt.—Where the denial of a defendant responsive to the plaintiff's charge is clear, precise and positive, and it is met by the assertion of one witness only, equally clear, precise and positive, the court will not make a decree for the plaintiff, unless circumstances appear, shewing, not indeed absolutely, that the truth is with the witness, but that there is a strong moral probability that his statement is true. With regard to the next part of this proposition, we find much contradiction in the books, and some difficulty in extracting from them a distinct rule for regulating the discretion of a court in awarding an issue. On the one hand it seems to us that the rule not to decree against the answer upon the unsupported testimony of a single witness, would be broken down, if whenever such a conflict existed, it could be left to a jury to decide whether greater credit should be given to the witness or to the party. But on the other hand, to order an issue only where the circumstances attaching credit to the assertion of the witness, clearly overbalance the credit due to the denial of the party, is calling on a jury where the Chancellor needs not its assistance, but has sufficient matter whereon to found a decree. Perhaps it is impossible to lay down a rule in precise terms, and some latitude must be allowed for the exercise of a sound discretion. It may be enough to

An issue should not be directed simply because the answer is contradicted by one witness.

Nor where the witness is supported by circumstances which, connected with his oath, discredit the denial of the defendant.

But one is properwhere between the witness and the answer, circumstances in evidence create an inclination in favor of the former, without estimating the interest of the defendant.

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say that there ought to be some circumstances giving a preponderance to the testimony of the witness, independently of the suspicion against the answer, arising from the interest of the party, before an issue should be awarded; but it is not necessary that these circumstance should be sufficient to produce a clear conviction on the mind of the Chancellor against the answer. If his inclination upon these circumstances be in favor of the witness, but his conscience is still in doubt, he may with propriety order an issue, or tender one to the defendant, who may accept or decline at his peril. In this case there were circumstances tending strongly to confirm the testimony of the witness, fully sufficient, nay demanding a decision in conformity to that testimony, but for the admitted participation of the witness in the base fraud charged. I shall name but a few that seem to us natural.—The others, though also much insisted on in argument, were not regarded as of much weight. The hour at which the transaction took place, is calculated to give support to the narrative of the witness. According to the testimony of *Hainline*, it must have been between 11 and 12 o'clock at night, long after the period at which it is customary for the plain farmers of our country, to retire to repose, and long after old age and infirmity are wont to seek in sleep for relief from weariness and care. The parties did not arrive at the house until two hours after dark, and from one to two hours elapsed afterwards before the witnesses were called in to see the execution of the instruments. The time was peculiarly fitted for playing off the infamous trick stated by *Bryant*, upon a man of eighty years of age, of weak sight, and infirm health, and no reason is given, if the purpose was an honest one, for selecting an hour so unusual for the transaction of business. This circumstance derives more weight from its being in direct contradiction to the defendant's answer, who aware of the suspicion it ought to excite, untruly states that the deeds were executed before early bed time. But the other circumstances stated by *Hainline* are far more strong. This witness and *Sheets*, according to the defendant's answer, were

the very persons selected by the old gentleman to be the witnesses of this transaction. Yet after their arrival at the house, the defendant himself who had brought them thither, in pursuance of the intestate's request, and for the very purpose of attesting what should take place, asks them out of the room, in order that the old man might be left *alone* with *Bryant*, and they do not return for an hour or two, nor until they are wanted, for the purpose of seeing or hearing acknowledged the formal execution of the papers. If *Bryant's* statement be true, we see at once an adequate motive for these witnesses being out of the way, while he shuffled off one of the papers, and substituted another in its place. If his statement be not true and the transaction was fair, the proceeding is wholly unaccounted for, and unaccountable. There is no proof that there was any other individual in the house, except the old man, *Bryant*, the defendant, and these two witnesses; all, according to the defendant's account, intended to be fully cognisant of what should take place, and relied upon to keep it a secret so long as he should live, in order to prevent an interruption among his children. The difficulty therefore in ascertaining the truth of the controverted matter of fact, did not arise from the want of circumstances to support the positive evidence of *Bryant*, but solely in deciding what degree of credit was due to the witness himself. As an acknowledged accomplice in the criminal act, he was of course obnoxious to strong suspicions. Yet he was a competent witness, and his tale rendered highly probable by corroborating facts, testified to by witnesses above suspicion. We think that the court acted right in leaving it to a jury, knowing the witness, and knowing the defendant whose answer was relied on to pass upon the credit which, under all circumstances, was due to the testimony of the one, and the denial of the other.

We are by no means satisfied with the general terms in which this issue was expressed. When a Judge wishes his conscience informed upon any matter of fact, the issue should be so framed, as to present that fact precisely to the jury. Whether a deed has been fairly or

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fraudulently obtained, is a general and indefinite issue, which might involve matter of law as well as of fact.—But on looking into the instructions given by the Judge to the jury, on the last trial of the issue, and into the motion to dismiss the bill, we cannot but see, that however vague may have been the terms of the issue, it was treated by all, as one specific in its nature, and embracing the naked fact in dispute.

The court therefore, does not reverse, but on the contrary, affirms the interlocutory order for the issue, nor does it see any reason to disapprove of the decision of the Judge, refusing a new trial. Three verdicts had been rendered all one way, and all founded upon sufficient proof, if *Bryant* was entitled to credit, and after thirty-six disinterested freeholders, selected by the parties, had on their oath declared that they believed him, it could not have been permitted to the Judge, to ask more for the satisfaction of his conscience, in this respect.

As to the interlocutory order which was made at October term, 1830, so far as the same declared the deed obtained by the defendant, to have been obtained by fraud, and decreed the delivery of the negroes, and directed the master to take an account, the court doth approve thereof. (His Honor then proceeded to correct some miscalculations in the report, which it is unnecessary to state.)

PER CURIAM.—JUDGMENT AFFIRMED.

WHITLOCK ARNOLD v. CLEMENT ARNOLD.

A contract fairly made, but under a misapprehension of its terms and of the price, will not be specifically executed, unless the defendant by his subsequent act, has ratified it, and thereby made it unconscientious in him to refuse its fulfilment.

The bill was for a specific performance of a contract, for the sale of certain slaves, which was stated to have been to this effect: that the defendant owned a female

slave, who had then six children, and was expected shortly to have another, and agreed, if allowed to select at his choice, three of the children to be kept by himself, to sell the mother and the remaining four children, including the unborn one, to the plaintiff, at the price of $1000; whereof, $100 was to be, and was paid down, and the balance payable upon the delivery of the slaves, which was to be made as soon as the mother should recover after the birth of the next child. The bill and a supplemental bill further charged, that afterwards, the plaintiff paid $300 more on the contract, but that the defendant refused to convey, and had sold three of the children, and another had been sold under execution against him; and insisted that by such sales the defendant had made his election of the three he had the right to choose, and that the value of the fourth should be applied towards the satisfaction of the purchase money.

The answer admited an agreement to sell, but denied that it was at that price. The defendant stated that he understood the price to be $1300; but discovering that the plaintiff understood or pretended it to be $1000, in a few minutes after making the contract, he declared that he would not comply, and offered to return the sum of $100 then paid, which the plaintiff, insisting on the bargain as claimed by him, refused to receive, and he then deposited it with a third person for him. The defendant stated the value of the slaves to be $1300, and said the subsequent payment of $300 was on other demands he had against the plaintiff, and he insisted that the contract ought not to be executed, or if executed, that the larger price should be allowed.

The proofs sustained the statement of the bill as to the terms of the contract; but the witnesses all stated that the defendant alleged immediately after it was closed, that he had misconceived it, and offered to return the money he had received, and gave the plaintiff notice that he would not stand to it. Two or three days afterwards, however, upon being assured by a person who was present, that the bargain was as alleged by the plaintiff, the defendant said he would abide by it, and about a month

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afterwards, received the further payment of $300 on it, without objection, or stating that he claimed a larger price than $1000, and pending this suit he had received further payments, expressing in some of his receipts, that they should be without prejudice. Several witnesses stated that the negroes were worth more than $1000.

Mendenhall and *Winston* for the plaintiff.

Nash for the defendant.

RUFFIN, Chief-Justice.—After stating the pleadings and proofs as above, proceeded:

If this case stood upon the original transaction, although the evidence establishes the contract as alleged by the plaintiff, the court would not give the relief sought. It would be unconscientious to insist on an agreement, into which the defendant had been surprised, and at a price below the value; although the inadequacy be not so unreasonable and glaring, as of itself to prevent the court from exercising this jurisdiction. But the subsequent acts of the defendant ratify the contract, as understood by the plaintiff, independent of his declaration to the witness, that he would comply with it. For he knew how the plaintiff construed the bargain, and in silence received payments from him, which must be taken as giving the plaintiff to understand that he yielded his own objections. In this position of the affair, the want of conscience will be on the other side, if the agreement be not performed, unless the price be altogether inadequate. Upon that point the evidence is, that the price was not the full value; but no witness says that it was so unreasonably low as to bespeak imposition. Indeed the number and ages of the negroes show that no great advantage could have been made. The plaintiff is therefore entitled to relief upon it. The defendant must elect to take those negroes which he himself sold, and as to those sold under execution, the most valuable must be allotted to him, and the other at the true value, must be a credit to the plaintiff, against the balance of the

purchase money. The master must enquire what slaves have been thus sold by the defendant, or for him, and when, and the value of those sold under execution; and also take an account of the balance due for the purchase money, computing interest from the time it was payable; and also an account of the hires and profits of the negroes, while in the defendant's possession, making him just allowances for their maintenance, and after taking all the accounts, ascertain the balance that may be due on the one side or the other.

PER CURIAM.—DIRECT AN ACCOUNT.

MARY B. GILLIS, *et al.* v. JOHN B. MARTIN.

A memorandum given by the bargainee at the time of receiving an absolute deed, whereby he stipulated that if the land was sold within two years, he would refund to the bargainor the excess received over the purchase money, and interest, together with the costs of repairs, unexplained and without evidence to the contrary, makes the deed a mortgage.

The bill was filed by the widow and heirs at law of *Malcolm Gillis*, for the redemption of a town lot in Laurenceville, and a peice of land conveyed by him to the defendant, by an absolute deed, dated the 21st of November, 1822, which the plaintiffs alleged was intended only as a security for a debt of $169, which they said had been discharged by the profits that had come, or ought to have come to the defendant's hands. The character given to the conveyance was founded on a written agreement of the defendant, of the same date, in which he stated that he had purchased the premises at the price of $169, but that if sold within two years for more than that sum and the interest on it, and such necessary repairs as might be done on the house, he would pay the surplus to *Gillis*.

The answer admitted the agreement, but denied that it was intended to make the deed merely a security, and averred that the purchase was an absolute one. The de-

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fendant gave this account of the transaction: That *Gillis* was indebted to him in the sum of $69, and to secure the payment had made a deed of trust for the premises in dispute—that he was about removing to Alabama, and was unable to pay the defendant, or remove without selling the land, which he could not effect to any body else, and that at length the defendant was prevailed on to purchase, and give one hundred dollars more than his debt, which was the full value, upon which he surrendered the deed of trust, and took an absolute conveyance—that after the contract was completed, and the deed executed and delivered, *Gillis* mentioned that his family might be dissatisfied at the price, and requested the defendant would agree to sell the premises, and pay him the surplus, which he readily agreed to, as he only wanted his money and interest, and had made the purchase only to oblige the other, and that thereupon he executed the writing, that it might satisfy the family. But that it was not at all understood that the paper was to to be connected with the deed, or in any event give the right of redemption, or change the purchase from an absolute one, or have any effect but to give him a claim to the surplus of the money that might be had upon a resale, after discharging the sum advanced by the defendant. The answer averred that *Gillis* had before applied for further advances, and to secure them by mortgage, which the defendant refused; and that *Gillis* then wishing to remove from the State, determined to sell, and made the sale to the defendant. The defendant further stated that he made repeated efforts to sell, but was unable to do so at any price, up to August, 1825, at which time, the houses having become ruinous and untenantable, he made some repairs, and personally occupied them, and that believing the absolute property to be in himself, he had since erected several out-houses, and made such repairs and additions as were indispensable to the comfortable occupation by his family.

To the answer there was a general replication, and the cause was then set down for hearing, and was heard without proofs on either side, and a decree made by

Judge DANIEL, declaring that the plaintiffs had a right to redeem, and refering it to the master to take an account of the sum due on the mortgage, including necessary repairs, deducting therefrom the rents and profits.

The master reported, and submitted two views, in the first of which, he gave the defendant credit for repairs made within the two years limited in the agreement, and charging him, after the subsequent improvements, an improved rent, upon which he found a balance due to the defendant of $44 93. In the second, he gave him credit for all the repairs and improvements, and charged the like rent, upon which he found the balance to be $746 55. The master reported that the defendant endeavored to sell or lease the premises, but that he could get neither a purchaser nor a tenant until 1824, on account of their uncomfortable situation—that he made some repairs, and then got a rent of six dollars, and that soon afterwards, he entered into possession himself, and made considerable repairs and improvements, so as to make the rent worth $35—that all the repairs and improvements were necessary for a convenient and comfortable residence, and were made by the defendant with that view.

The cause came on again in the Superior Court, upon a motion for further directions, when the report was confirmed *pro forma*, according to the first view submitted by the master, and a decree pronounced accordingly, from which the defendant appealed to this Court.

No counsel appeared for the plaintiff.

Mendenhall for the defendant.

RUFFIN, Chief-Justice.—After stating the pleadings and report, as above set forth, proceeded as follows:

For the defendant, it is insisted, that both decrees are erroneous, for that the purchase was absolute, but if not, that the defendant had a right to make the improvements, or at all events, is not to be charged with rents, as for those improvements.

The case is not free from doubt upon the first point. The character of the conveyance is to be determined by the intention of the parties, and if that, however as-

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certained, was that it should operate as a security, the court so regards it, and the debtor will be entitled to redeem. The difficulty is always in ascertaining the intention. Here the instrument called by the plaintiffs a defeasance, is admitted in the answer, but the defendant denies that it was given with the view of turning his purchase into a security. For the purpose of supporting that assertion, he states that the price mentioned in it was a full one, that he then gave up a former and more effectual security for the debt which *Gillis* owed him, which he would not have done, if he had considered that he was only taking a mortgage for that, and the additional sum then paid, and that *Gillis* was about removing to distant parts, and had no expectation or wish to redeem the premises, and therefore cannot be supposed to have stipulated for it. These circumstances would be very strong to repel the inference from the words of the agreement, if they appeared in a way for the court to take notice of them. But they do not. It no where appears that the defendant ever had a deed of trust. It is true, that upon the evidence before the master, upon the taking of the account, it appears that $169 was the full value, and that *Gillis* was about to remove to Alabama. But the court is confined on an appeal, to the proofs upon which the decree impeached for error, was founded. When the decree for redemption and an account was made, there were no proofs but the exhibits, and the defendant's answer; and the answer after replication, is not evidence for the defendant, except as it is made so by discoveries called for in the bill, and which are responsive to direct charges, or special interrogatories. Here the bill charges nothing but the execution of the agreement, which is appended to the bill, by force of which alone the right to redemption is claimed, and interrogates the defendant as to its execution. That the answer admits. The other circumstances brought forward in the answer are new matters, and must therefore be proved by the defendant, before they can vary the decree.

On an appeal in equity the Supreme Court is confined to the proofs upon which the decree sought to be reversed was founded.

An answer replied to, is evidence for the defendant only when it is responsive to the bill.

Confining ourselves to the instrument itself, the first

decree pronounced in the Superior Court, seems to us to be correct. The transaction cannot be regarded as a sale, accompanied by an agreement for a re-purchase by the vendor, upon which he must come strictly within time; for nothing of that sort is pretended on either side. If it were so, it would be supported, though the court watches such agreements, and construes them to be securities, unless a contrary intention be manifest from the circumstances. (*Poindexter* v. *McCannon*, 1 *Dev. Eq. Cas.* 373.) But here no payment by *Gillis* is stipulated for, to be made at any time, as a price for the land. But it is contended the agreement was not for redemption, which might be had at any time, but that an eventual arrangement of property was contemplated, and that this was at least a conditional sale, to become absolute in the defendant, in the event he did not sell to another within two years. It is difficult to say that, on the face of the papers. An interest is reserved to *Gillis* in the sum that might be got for it, upon a sale to another; which is the surplus, not above a particular sum *in numero*, but above the advances then, and the disbursements on the property, and interest. The question is, does this show that the object was primarily to secure those advances, for if it does, then redemption and all other incidents of a mortgage follow. To us the affirmative seems true. It cannot be doubted, that if the defendant had sold, he would have been obliged to pay the surplus to *Gillis*; nor that if *Gillis* had within two years tendered what was due, he would have had a right to a reconveyance, and that, not upon the ground of a stipulation to that effect—for there is none such in the instrument—but upon the equity raised for him here, by seeing that since he was to have the surplus, the defendant's interest was limited to the sum due him, and beyond that, *Gillis* was the real owner. Besides, upon a settlement either before or after a sale, what is made the basis of it? The debt and interest, and the outlays for necessary repairs and interest. The defendant then does not go into possession as owners generally do, and erect or pull down buildings at his pleasure, but re-

The case of *Poindexter* v. *McCannon* (*ante* 1 *vol. p.* 373) approved.

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strains himself to necessary improvements, and as to them, he is to keep accounts against either the debtor or the estate; which we think, in the absence of evidence of the value of the estate, and all other circumstances, is conclusive upon the character of the conveyance originally. If it was then a security, it remains so in the hands of the defendant, although it would be otherwise in the hands of a *bona fide* purchaser, even with notice, upon the score of a personal confidence in the defendant to make a sale, and receive the purchase money, to the application of which the purchaser would therefore not be bound to see. But no agreement at the time of the contract, that the purchase shall in default of the debtor become absolute owner even at an increased price, is permitted by the court to bar redemption, if the subject was once redeemable. (*Willet* v. *Winnell*, 1 *Vern.* 488. *Seton* v. *Slade*, 7 *Ves.* 273).

An agreement at the execution of a mortgage, that in default of the debtor it should become absolute, is never a bar to redemption.

The last decree was merely formal, and seems to have been made to enable the parties to bring the other speedily under revision. We think it too rigorous towards the defendant under the circumstances of the case. Every mortgagee in possession, if not bound to repair, is at least entitled to his expenditures for that purpose, and they form part of the debt on which the interest runs. (*Godfrey* v. *Watson*, 3 *Atk.* 518)—and so, for other outlays for the preservation of the estate. (*Hardy* v. *Reeves*, 4 *Ves.* 466). As to new improvements, the general rule is otherwise, but is not unyielding. (4 *Kent's Com.*) It is adopted by the Court, as necessary to protect the mortgagor from imposition, and from having increased difficulties thrown in the way of redemption. The creditor is not therefore allowed to improve the debtor out of his estate. But where the mortgagee takes possession, not only by the consent, but as it were, at the instance of the mortgagor, and the improvement is permanent and beneficial, and, without it, the estate would be altogether unproductive, so that the mortgagor as a prudent man, would make it if he were himself in possession, and the mortgagee really made it under the belief that the estate was his own, and that he was rendering

A mortgagee in possession is entitled to the costs of repairs and interest thereon.

But generally it is otherwise as to improvements, because by allowing for their cost, the difficulty of redemption is increased.

But where the mortgagor, thinking himself to be the owner, *bona fide* makes improvements which exhausts the rent, he is allowed for their costs.

the property more valuable as for himself, and not with a view of bringing the expense into account against his debtor, there seems to be a ground for repelling the application of the rule. The principle upon which it is founded, does not reach such a case; which stands rather on another, that he who takes benefit by the labour or money of another person, not laid out against his will or his interest, shall make compensation. Upon this ground, improvements were allowed for by this Court, in *Bissell* v. *Bozman*, when last before us, because they were proper, and *Bozman*, at the time of making them, deemed himself the owner, and it was held to be otherwise, only upon a nice legal construction. There is no doubt, upon the evidence before the Master, in this case, that either the defendant's was a purchase, or that he conceived it, and with much reason, to be so; and that he acted with good faith in his endeavour to sell, before he laid out more money, and also in making his expenditures. It is in proof, that the sum he advanced, was a full price—that the debtor was then removing, and did remove to Alabama, and therefore had no actual intention to redeem, but expected at most a sale, and that he could not get a tenant at any price without improvements, and that all which the defendant made are absolutely necessary to make the place even comfortable. These circumstances seem to render the case peculiar, and to entitle the defendant to be protected in his expenditures, for as they were incured honestly, he may claim at least to be a bailiff or steward, endeavouring to serve the owner, instead of a creditor, striving to make a pledge his own property. Moreover, the difference is not very great, for the first view taken by the master could not possibly stand, since it charges the defendant with a rent the premises ought to bring both under the repairs and improvements. The rent thus given, exceeds the interest upon both the debt and the repairs, and improvements, and the proof is, that if repairs alone had been made, no tenant could have been had. The whole rent is therefore justly attributable to the improvements, and will nearly discharge the cost of them, so as to make the

The case of *Bissell* v. *Bozman*, *ante*, p. 229 approved.

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balance of the account consist almost entirely of the debt, repairs and interest, for which the mortgaged premises are undoubtedly answerable. But we think the case upon its own circumstances forms an exception, if any can, which appeals to the sound discretion of the Court to make those allowances, upon the footing of fair dealing between these parties, and as no exception is taken to the estimates of the master, as contained in either view submitted by him, but only to the principles upon which they are respectively based, the former decree must be reversed, and the report of the master, finding the balance due to the defendant, on the 15th day of March, 1833, to be $746 55, as exhibited in the account annexed to the report, must be confirmed, and a decree made accordingly—that the plaintiff pay the same to the defendant, within four months from the day of making this decree, together with the costs of his suit in the Superior Court, and upon such payment being made by the plaintiff, *Mary B. Gillis*, the widow, that the defendant convey the mortgaged premises to her by way of assignment of his title to the same as a mortgage, or if the payment be made by the other plaintiffs, that the defendant do convey to the plaintiffs, *John E.*, *Amanda A.*, and *Eliza M.*, the children and heirs at law of the mortgagor; and in default of such payment, the bill to stand dismissed. Upon a bill for foreclosure, the practice in this court has been to decree a sale as being more advantageous to the debtor, and as the creditor is seeking in that suit the recovery of his debt. But upon a bill to redeem, a sale cannot be ordered, except upon consent, because the mortgagee ought not to be compelled to relinquish the estate upon any other terms than receiving his whole debt, which he might ultimately get by reception of the rents, and may not by a sale. (*Troughton* v. *Binkes*, 6 *Ves.* 573.

Upon a bill for redemption, a sale is never ordered, unless by consent. It is otherwise when a foreclosure is sought.

PER CURIAM.—DECREE REVERSED.

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ROBERT B. MITCHELL, *et al.*

v.

NATHANIEL ROBARDS, *Ex. of* JOHN WASHINGTON.

No decree can be made against an executor, unless assets are admitted by him, or found upon a reference—and where he is made a defendant by *sci. fa.* after establishing the right of the plaintiff, the proper step is to direct an inquiry as to assets.

The cases of *Ryan* v. *Blount* (*ante p.* 382) and of *Wood* v. *Brownrigg*, (3 *Dev. Rep.* 430) approved.

This was a bill originally filed against the testator of the defendant, for an account of the assets of *John C. Russell*, who had appointed him executor of his will, and guardian of the plaintiffs, his children. Pending the suit *Washington* died, and the present defendant was made a party by *scire facias*.

At a former term of the court, there had been a reference directed, and the master had reported. Both parties excepted to the report for matters purely of fact, and a decree was passed.

At this term the defendant filed a petition to rehear that decree, and assigned two errors as existing in it:—

1st. That the master had charged him with compound interest from the death of his testator up to the time of entering the decree.

2d. That by the decree execution was awarded of the goods and chattels of his testator in his hands, when he never had been charged with the receipt of any thing, and never had an opportunity of answering as to the receipt and disbursement of the assets by him, and when no account of his administration had been taken.

The petitioner stated that he never had notice of the objectionable parts of the decree, until after the close of the term in which it was made, as the final decree, upon the order overruling some exceptions and sustaining others, was drawn up upon a report of the master, upon directions to him to amend his first report according to the order upon the exception, and that this last report, as well as the final decree, was drawn up after his counsel had left the court to attend the circuit.

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Devereux, for the petition.

Badger and *W. H. Haywood*, *contra*.

RUFFIN, Chief-Justice.—After stating the pleadings and report, as above set forth, proceeded as follows:

Interest is not compounded against a guardian for the time when the funds of the ward remain in his hands, after the relation has ceased.

The principle of computation acted on by the clerk is contrary to the rule laid down in *Ryan* v. *Blount*, (1 *Dev. Eq. Cas.* 382,) and *Wood* v. *Brownrigg*, (3 *Dev. Rep.* 450,) and the decree must be opened in this respect, and the account refered again to the master, to compute simple instead of compound interest, from the death of *Washington*, the guardian.

The last point is of more consequence as a general question. The bill was filed against *Washington* in his life time, and upon his death, was revived against his executor by *scire facias*, and not by bill. The *sci. fa.* does not suggest assets in the hands of the executor, nor call for an answer, nor could it. Upon the hearing, a decree was made that *Washington* was indebted to the plaintiffs in a certain sum, and that they might have execution therefor against the assets in the hands of the executor. Such decrees have crept into use of late unadvisedly, owing to the manner of reviving by *scire facias*. which does not admit of an answer by the executor acknowledging assets, or stating an account. But they are against principle, and will not in future be passed. The primary jurisdiction of the court, is *in personam*, and although our statutes allow executions in equity, the nature of the decree is not altered, but only that process is substituted, at the election of the party, for that of contempt. The decree is against the defendant personally, regarding him as a trustee by reason of the fund in his hands, applicable to the plaintiffs satisfaction. And no decree ought ever to be given for raising the money, unless the assets be admitted by the defendant, or found upon a reference. Of course this makes a reference indispensable in every case of a revival by *scire facias*, which should make plaintiffs more particular about the mode of reviving. For it increases the expense certainly and they may lose the important advantage of fixing the defendant with assets

by confession in an early stage of the cause, and before they have been applied to other creditors. Indeed the court has felt a difficulty in saying that there could be any account of the assets ordered upon such a revivor, as this mode seems only to be proper when the executor is a formal party, and no relief prayed against him. But it is understood that the practice has been otherwise, and therefore a reference is allowed as incidental to the relief. Certainly an absolute decree cannot pass until assets be found; and we should not know how to treat such a decree upon an application for execution against the assets. If in analogy to the judgment at law, it would be conclusive and subject the executor to payment unless he produced property. But that could not be sustained, for the rule of pleading is different. At law, a party is held to admit all he does not put in issue. In equity, it is just the contrary; and if the answer neither admit nor deny a fact charged by the plaintiff, it may be excepted to as insufficient. The object is to get the discovery. Therefore, the decree would conclude nothing but the sum declared to be due. No process ought to issue on it.

The decree must therefore be reformed in this respect, and a reference made to a master to take an account of the assets of the testator *Washington*, which came to the hands of his executor, the defendant, and the disposition thereof made, and his disbursements; and if any part thereof remain in specific articles, of what the same consist, and the value thereof, and the profits made on the estate by the defendant, or any person under his authority, or that might have been made, making all just allowances, and report the same with any special matters by any of the parties required.

PER CURIAM.—ORDER ACCORDINGLY.

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WILLIAM BUFORD

v.

THOMAS NEELY, *adm'r. of* WILLIS PILKINGTON, RAGLAND ROBERTS, *et al.*

An assignment by one of two copartners, of his interest in the copartnership, is a dissolution of it, because the other is not bound to receive the assignee as a partner. But where the assignment was a mere security, and it was agreed by all parties that the assignor should act in the partnership business as agent of the assignee, it does not produce this effect. And upon a bill by the assignor for an account of the partnership, the assignor and the other partner are proper parties.

The plaintiff alleged that in September, 1815, one *Hicks* and *Pilkington*, the intestate, entered into copartnership, and did business at Lynchburg in Virginia; that *Hicks* advanced 3000 dollars, and *Pilkington* 2000 dollars, which constituted the capital. That the profits were to be divided in the proportion of three fifths to *Hicks*, and the residue to *Pilkington*, who was to be the managing partner. That the plaintiff, in March, 1816, with the consent of *Pilkington*, bought the interest of *Hicks* in the partnership. That the partnership business was transacted in Lynchburg, until December, 1816, when, by consent of all parties, the goods &c. were removed to Stokes county, in this State, where a profitable business was carried on until the year 1819. That in March 1819, the plaintiff assigned his interest in the copartnership to *Abraham & John Shelton*, (defendants,) upon trust, to secure *Abraham & John Bufort*, (also defendants,) as his sureties in sundry debts, which were specified in the assignment. That *Pilkington* knew of this assignment and consented thereto, and had uniformly, after its date, until the sale hereafter mentioned, treated the plaintiff as a partner, by returning him statements of the partnership dealings, &c. That the debts secured by this deed had been paid by the plaintiff, and the deed, as a security, abondoned by the assignees and their *cestuique* trusts. The plaintiff then charged that *Pilkington*, intending to defraud him, had combined with the defendant *Roberts*, who was a young man without

capital, and a clerk of the copartnership, and in September, 1818, had advertised the stock of goods for sale, and had, at a pretended sale, exposed them in large lots, and in conjunction with *Roberts*, had brought them in at a nominal price, and commenced a new firm under the title of *Pilkington & Roberts*. The plaintiff averred that this new copartnership was conducted with the effects of the old one, and he prayed an account of the profits of both; admitting that *Pilkington* had paid, or was bound to pay, a part of the money due *Hicks* for the purchase of his interest, and submitting that he should have credit therefor, or be protected therefrom, in the final adjustment of the accounts.

The two *Sheltons* and the two *Buforts* in their answers disclaimed any interest under the assignment, and admitted that if any thing was due upon a settlement of the copartnership accounts, it belonged to the plaintiff.

The defendant *Pilkington*, in his answer admitted most of the allegations of the bill. He insisted that if he was liable to account at all, it was to the *Sheltons* under the assignment, and not to the plaintiff—that his recognition of the plaintiff, as a partner, proceeded from the fact that he was constituted the agent of the assignees, and their *cestui que* trusts, in managing the copartnership business. He insisted that the copartnership expired on the first of September, 1818, and that not knowing where the plaintiff then resided, he did not give him notice of an intended sale, which he averred was advertised at several places, and conducted fairly, being upon a credit of six months. But he admitted that the goods were sold in lots, and that he and *Roberts* had purchased nearly all of them, and that these purchases formed a part of the stock of the new copartnership of *Pilkington & Roberts*. He denied that profits had been made by the copartnership of which the plaintiff was a member, and insisted that the business had resulted in a heavy loss, which had absorbed the capital. He admitted, that subject to the claim of the assignees in trust, the plaintiff was entitled, and stated that prior to the assignment being executed, the name of *Abraham Bufort* had, with

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his consent been inserted in the copartnership articles, instead of that of the plaintiff, for fear of embarrassment from the creditors of the latter.

The defendant *Roberts* joined in this answer, to which a replication was filed.

Pilkington filed a cross bill, in which he insisted upon the matters set forth in his answer, praying that he might be allowed compensation for attending to the business of the copartnership, and be protected from loss by reason of his suretyship for the plaintiff to *Hicks*, and for a decree against the plaintiff for his, the latter's, share of the loss which had taken place.

To this bill the defendant answered, and set forth an extract from the articles of copartnership, whereby *Pilkington* agreed to attend to the copartnership business without compensation. He denied the losses, and submitted to an account, and that *Pilkington* should be protected from loss as prayed by him.

Pilkington died during the pendency of the suit, and the defendant *Neely* was made a party to the original bill, by *sci. fa.* and appeared and prosecuted the cross bill.

In the court below, a reference which was to be without prejudice to the parties, was directed. The master reported a balance due the plaintiff, and exceptions were taken to the report by both parties. Many of them involved simple questions of fact. Those upon which questions of law arose, were the fourth of the defendant *Neely*, because the master had rejected a claim for compensation to his intestate, for managing the copartnership business.

The case was argued both upon the right of the plaintiff to an account, and upon the exceptions to the report, by *Badger* and *Devereux* for the plaintiff, and by *Nash* and *Winston* for the defendants, *Neely* and *Roberts*.

DANIEL, Judge.—After stating the material facts, proceeded as follows:

The plaintiff having assigned his interest in the firm by an absolute deed, in the year 1816, to *Abraham Bufort*, it is now contended by *Roberts* and *Pilkington's* administrator, two of the defendants, that the partnership

was dissolved at that time by that act, and no account of the partnership transactions could be decreed after that period. It is true that a *bona fide* assignment by one partner of his share, is a dissolution of the partnership, at the election of either. The remaining partners may not have confidence in the assignee; nor may the assignee choose to be concerned in trade. (*Griswold* v. *Waddington*, 15 *John* 82. *Marquand* v. *Manufacturing Company*, 17 *John* 535.) But in this case, it was expressly agreed by the parties, that the partnership should continue. It was agreed by the deed of 1816, that *Abraham Bufort* should appear as the partner, and that *William Bufort* should act as his agent. By the deed executed in 1817 by the plaintiff to the two *Sheltons* in trust to secure *Abraham* and *John Bufort* for their liabilities for the plaintiff, the same property is conveyed as as that contained in the deed of 1816, and it is recited in the last deed, that the first was considered ineffectual for the purposes intended. *Abraham Bufort*, by agreeing that the same property should be conveyed to the *Sheltons*, admitted that he had no title under the first deed; or, at most, it was considered as a mortgage. It is contended that if *Pilkington* and *Roberts* are bound to account, they should do so only to *Abraham Bufort*, or the *Sheltons*, who now are the owners of the share which formerly belonged to the plaintiff.

On this point the defendant's counsel has cited several authorities. When examined, they prove nothing more, where there is no collusion, than this; a creditor shall not be permitted in equity to file a bill for relief against the executor and a debtor of the testator, or against an assignee in bankruptcy, and a debtor to the bankrupt, or against a trustee and a debtor of the assignor, where all the assignor's effects and debts are transferred for the benefit of all his creditors. Where there is no fraud, the creditor's remedy is against him who has the legal title. If this was not the rule, every debtor to such estates might be harrassed with a bill in equity. The plaintiff does not claim as a creditor, nor is he seeking a surplus under a resulting trust, arising from the deed to the

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Sheltons. Ever since the date of that deed, *Abraham Bufort* has not pretended to be considered as a partner in the concern, but *William* has always claimed to be and has been so acknowledged by *Pilkington* himself. It is a general rule, that where a bill is brought for relief, all persons materially interested in the subject of the suit, should be parties, either as plaintiffs or defendants, in order to prevent a multiplicity of suits, and that there may be a complete decree between all parties having material interests. (2 *Mad. C.* 179. If the assignees in this case, had brought a bill for an account and relief, the assignor must have been made a party to show his interest if he had any, for how would the defendant be protected against the assignor, if it should turn out that the assignment was not valid. (*Cathcart* v. *Lewis*, 1 *Ves. Jun.* 463. *Ray* v. *Fenwick*, 3 *Bro. Ch.* 35.) In this case all the parties have been brought before the court, and those persons, who the defendant says have the absolute interest which formerly belonged to the plaintiff, disclaim any interest, and expressly state that it all belongs to the plaintiff. The defendant *Pilkington* admits in his answer, that the plaintiff had an ultimate interest, after *Abraham* and *John Bufort* should be satisfied. The defendant *Pilkington*, also admits sufficiently in his answer, for us to see that he always treated the plaintiff as a partner; he made monthly returns to him of the sales, kept up a correspondence with him upon the subject of the concern, and agreed to come to a settlement with him. And we think there is nothing to prevent the defendants now accounting with him.

The principal debtor is not a necessary party to a bill to settle a copartnership where the plaintiff has assigned his interest in it to indemnify the surety.

It is said that although *Abraham* and *John Bufort* and the *Sheltons* now disclaim any interest, yet the court should not let the plaintiff have the fund, unless it should appear that all the creditors of *William Bufort*, mentioned in the deed of trust of 1817, have been satisfied. The answer is that the deed of trust was to secure *Abraham* and *John Bufort* for their liabilities to those creditors mentioned in the deed of trust. The trustees and *Abraham* and *John Bufort*, admitting that they are satisfied, is presumptive evidence that all those creditors have

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been paid: it does not appear that they have not been paid. And if it should appear that they have not, I am not prepared to say, that would prevent the relief he is seeking.

A sale of th joint effects in lots, made by one partner, and a purchase by him, does not divest the property of the other, and the latter is entitled to an account of the profits thereof.

We are of the opinion that the defendant *Pilkington's* adm'r. is liable to account to the plaintiff, *William Bufort*, as a partner of all the firms mentioned in the bill, and that *Roberts'* and *Pilkington's* administrators are liable to account to *William Bufort* for his part of the capital and the profits that were made on the same, after the time, when by the original articles, the partnership expired. We consider the sale of the stock of goods made by *Pilkington*, and purchased by him and *Roberts*, a fraudulent transaction. *William Bufort* was not divested by the sale of his interest in the stock in trade, and as the defendants *Pilkington* and *Roberts* traded upon that stock and capital, if any profits were made, three fifths of the same belonged to *William Bufort*.

A report having been made in these cases, subject to the opinion of the court, whether *Pilkington* and *Roberts* were bound to account, and the court being of opinion that they are; exceptions have been filed by both parties to the said report, and the exceptions now come to to be decided. His Honor here considered several of the exceptions which involved questions of fact.

The defendant's exceptions will now be considered. The 1st, 2d and 3d exceptions are overruled. His Honor here stated the reasons shortly.

The 4th exception is overruled. *Pilkington* was bound by articles of copartnership to attend personally to the business; he did not stipulate for compensation. He is not entitled to receive remuneration for doing that which he agreed to perform, and which it was his duty as partner to transact. It has been held that a surviving partner, when there is not an express stipulation to that effect, is not entitled to charge in account a sum of money as a compensation to himself for his management of the trade, and for his time and labour; he cannot in the absence of a positive agreement, claim an allowance for carrying on the trade. (*Burden* v. *Burden*, 1 *Ves. & Bea.*

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170. *Gow.* 380. 381.) The 5th exception is overruled, as to all but the sum of $60, with interest from the 1st day of October 1824, which is allowed for *Pilkington's* services and expences in attending to the suit, brought by *Hicks* against him as the surety of the plaintiff.

PER CURIAM.—DECREE ACCORDINGLY.